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JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1925.

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PRIVY COUNCIL.

(On Appeal from the Chief Court of Lower Burma.)

PRESENT :—LORD SHAW, LORD PHILLIMORE, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Kirkwood *alias* Ma Thein and others ... *Appellants**

v.

Maung Sin and another ... *Respondents.*

P. C.

Kirkwood *v.* Maung Sin.

*Buddhist Law—Burmese—*Orasa*—Who is—Eldest child a daughter—Effect —The eldest of the sons if can be* orasa.

The designation *orasa* is not limited to a son and it connotes the eldest or first-born child who is competent to undertake the responsibilities of the deceased parent.

A Burmese husband and wife had four children, the eldest of whom was a daughter, the next two sons, and the youngest a daughter. The mother died first and thereupon the eldest child, *i. e.*, the first daughter assumed all her responsibilities for which she was quite competent. Then the elder of the two sons died after having attained majority leaving several children, who on the death of their grandfather claimed a preferential share of one-fourth of his estate on the ground that their deceased father was an *orasa* son. *Held,* affirming the decision of the High Court, their claim for one-fourth of the estate was not sustainable as the daughter who was born first was *orasa* and not the son.

Appeal from a judgment of the Chief Court of Lower Burma (Appellate Side), dated the 6th September, 1921, reversing a decree of the District Court of Hanthawaddy (4th November, 1918).

The action raised the question of the rules of intestate succession under Burmese Law ; and the main point at issue was whether, in a case where the eldest child of the family is a daughter and survives both her parents, the children of the eldest son (a younger child than the daughter) who was competent to inherit and had attained his majority before his death, are entitled to take the one-fourth share of the estate of their paternal grandfather on the ground that their father was an *orasa* son.

*P C Appeal No. 81 of 1923. 7th August, 1924.

The District Court of Hanthawaddy (Nanavati, J.) on the 4th November, 1918, pronounced judgment, answering this issue in the affirmative.

Upon appeal the Appellate Side of the Chief Court of Lower Burma (Robinson, C. J. and Duckworth, J.) in view of the importance of the question involved and the conflicting nature of the codified and case-law on the matter referred the following questions, under S. 11 of the Lower Burma Courts Act, *viz.* :—

"1. In a family consisting of both sons and daughters can any child acquire the full status of *orasa* prior to the death of either parent ?

"2. If so, in such a family where the eldest child is a daughter, can any son become *orasa* until his father dies ?

"3. In such a family, can the question which child is the *orasa* be decided before the death of either parent ?

"4. Can there be in such a family two *orasas* ?

"5. Are sons always to be preferred to daughters as *orasa* ?

"6. In such a family, can there be an *orasa* son who, predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate ?

"7. If so, can the eldest child, being a daughter, on her predeceasing her father, claim a quarter share as *orasa* or transmit to her children a right to preferential treatment in the division of the estate ? "

for decision to the Full Bench (Robinson, C. J., Maung Kin, Pratt, Heald and Duckworth, JJ.) who, on the 29th August, 1921, delivered judgment, answering the said questions as follows :—

"1. Yes.

"2. Where the eldest child is a daughter no son can become *orasa*.

"3. Yes.

"4. No.

"5. No, unless the son is the eldest born.

"6. In a family where the eldest born child is a daughter and is competent there can be no *orasa* son and there can be no son whose children have a right to preferential treatment in the division of the parents' estate.

"7. Yes."

Thereupon on the 6th September, 1921, the Chief Court of Lower Burma (Appellate Side) gave judgment in the appeal in accordance with the findings of the Full Bench, setting aside the decree of the District Court, and declaring that the appellants are entitled collectively to no more than one-sixteenth (and not one-fourth) of the estate of U Baw and his first wife Daw Hmo, the common ancestors referred to below in the judgment of their Lordships.

The appellants appealed to His Majesty in Council.

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Kirkwood v. Maung Sin.

The facts and arguments appear sufficiently from the judgment of the Board.

L. de Gruyther, K. C. and *Geoffrey Lawrence* for appellants.

A. M. Dunne, K. C. and *E. B. Raikes* for respondents.

The following authorities were cited in the course of the argument :—

Richardson's Law of Menoo, pp. 286-314 ; U Gaung's Digest of Burmese Buddhist Law, Vol. I, pp. 199-243 ; *Ma Mye Thu* v. *Maung Po Thu*, P. J. (1893-1899), p. 585 ; *Po Zan* v. *Maung Nyo*, 7 L B R 27 ; *Ma Hien Bun* v. *U Shu Gon*, 8 L B R 1 ; *Mi Min Din* v. *Mi Hle*, (1904) 6 U B R Buddhist Law of Inheritance, p. 11 ; *Ma Thu* v. *Ma Hle Dun*, 5 B L T 73 ; *Mi Saung* v. *Mi Kun* (Chan Toon's Leading Cases 1. 198) ; *Ma Me* v. *Ma Myit* (Chan Toon's Leading Cases II. 61) ; *Anleathan* v. *Mi Tha Ta U.* (Chan Toon's Leading Cases II. 65) ; *Maung San Dwa* v. *Ma Min Tha* (Chan Toon's Leading Cases II. 202) ; *Maung Seik Kaung* v. *Maung Poh Nylin* (Chan Toon's Leading Cases, Vol. II) ; *Poh Hman* v. *Maung Tin*, 7 L. B. R. 113 ; *Tun Myaing* v. *Ba Tun*, 2 L. B. R. 292 . 3 L. B. R. 45 ; *Gun Bon* v. *Poh Kyaw*, 11 U B R (1897-1901), 66 ; *Ma Saw Ngwe* v. *Ma Thein Yin*, 1 L B R 198 ; *Po Sein* v. *Po Min*, 3 L B R 45 ; *Ein Tha* v. *Hla Dun*, 5 B L T 73 ; *Ma Su* v. *Ma Tin*, 6 L B R 77; *Tha Gywe's Conflict of Authority on Buddhist Law*, II. 37-51; *Tha Dun* v. *Waing Gyi* (Civil and Appeal No. 302 of 1909 of J. C. W. B's Court) ; Sarkar's *Hindu Law of Adoption*, 2nd Edition, p. 57 ; Stoke's *Hindu Law Books* p. 410; Mayne's *Hindu Law*, 7th Edition, p. 82 ; Tagore Law Lectures, 1880, p. 515 ; *Ma Thi* v. *Ma Nu*, Debited Judgments, 70; *Po Lat* v. *Mi Po Le*, Debited Judgments 212 ; *Ma On* v. *Shwe O*, Debited Judgments, 378 ; *Mg. Sa So* v. *Mi Han*, 2 U B R (1892-1896). p. 171 ;*Ma Min Tha* v. *Ma Naw*, 2 U B R (1892-96) 581; *Ma Mya* (*Thu*) v. *Po Thin* (*Thein*), Printed Judgments, p. 585 ; *Mg. Pan* v. *Ma Mya*, 2 U B R (1897-1910) 104 ; *Maung Hmu* v. *Po Thin*, 1 L B R 50 ; *Ma Nam Gyaw* v. *Maung Shweket*, 10 Agabeg's Law R. 234 ; *Ma Thin* v. *Ma Wa Yon*, 2 L B R 255 ; *Ma Kyi Kyi* v. *Ma Thein*, 3 L B R 8 ; *Ma Tu* v. *Maung Bya*, 4 L B R 181 ; *Ma Thin* v. *Ma Nyein E*, 3 B L T 6 ; *Ma Nin Gaing* v. *Ma Tha Li*, 4 B L T 74; *Mi Saw Myin* v. *Mi Shwe Thin*, 1 U B R 125; *Pan Nyo* v. *Lu Hman*, 7 L B R 27 ; *Ma Thit* v. *Thum Tha*, 8 B L T 38, on appeal to P.C. in 9 L B R 56 ; *Ka Gu* v. *Ma Nin Nywe*, 8 B L T 196 ; *Nga E.* v. *Aung Thein*, 2 U B R 37 ; *Mi Hlaing* v. *Mi Thi*, 2 U B R 40 ; *Ma The O* v. *Mi Shwe*, 2 U B R 46 ; *Lu Daw* v. *Mi Mo Yi*, 2 U B R 66 ; *Po Hman* v. *Maung Tin*, 8 L B R 113 ; *Shwe Po* v. *Maung Bein*, 8 L B R. 115; *Ma Sein Ton* v. *Ma Thein*, 8 L B R 501 ; *Kyi Hlaing* v. *Ma Tu*, 8 L B R 189; *Chan Tha* v. *Mi Ma Pyu*, 9 B L T. 95.

7th August, 1924. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI :—This appeal arises out of a suit for the administration of the estate of one U Baw, a native of Burma, subject to the Burmese-Buddhist Law. U Baw died on the 28th December, 1907 ; his wife, Daw Hmo, is said to have died some years before. U Baw had by her four

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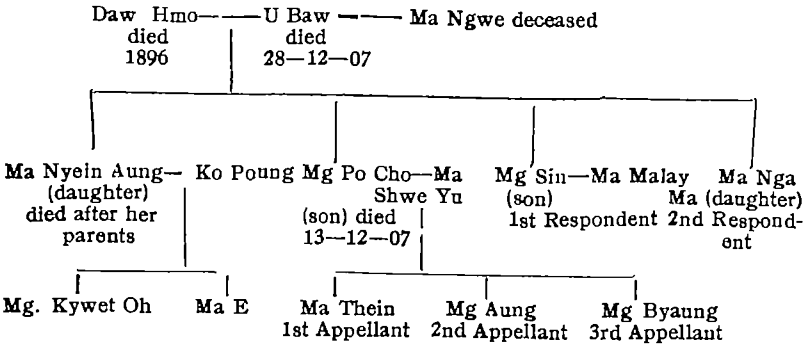
children. The following table will explain the relationship of the parties :—



U Baw had a second or junior wife, but she does not enter into the present controversy.

Po Cho, the elder son of U Baw and Daw Hmo, died a fortnight or so before the death of his father, leaving several children, who are the plaintiffs in this action. They claim a one-fourth share of the estate of U Baw on the ground that their father, Po Cho, was the *orasa* son of his father, and was consequently, under the Burmese-Buddhist Law, entitled to a preferential share of one-fourth in U Baw's estate. The claim is set out thus in the plaint :—

"That the said Ko Po Cho was the eldest son of the said U Baw and attained his majority and assisted the said U Baw in his business and kept up filial relations with the said U Baw up to his death, and the said Ko Po Cho attained the complete status of an *orasa* son of the said U Baw."

In paragraph 6 the plaintiffs set out the basis of their own rights. They say that—

"As children and representatives of the said *orasa* son, they are entitled to an equal share in the estate of U Baw with each of their uncles and aunts, the said Ma Nyein Aung, Maung Sin and Ma Nga Ma, and that as the second or lesser wife Ma Ngwe has since died they claim a one-quarter share of the whole of the said estate of U Baw."

The defendants deny the plaintiffs' claim and the allegation that Po Cho was the *orasa* son.

In order to understand the controversy and follow exactly the decisions of the Court in Burma in this case, it is necessary to explain that the Burmese-Buddhist Law is contained in a series of books entitled *Dhammathats* which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not from before. This is lucidly set out in the Digest of U Gaung, printed under the

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auspices of the British Government. The author of this work, a distinguished Burmese jurist, describes a *Dhammathat* to be a "collection of rules which are in accordance with custom and usage" of the Burmese people. In his remarks on the treatment in these treatises of the subject of inheritance, Mr. Gaung observes that "the seven divisions of the Law of Inheritance are treated in the *Dhammathats* in such a very unsystematic and unmethodical way that it becomes a tedious task for any one who attempts to study the subject." In order to arrive at a definite conclusion on the points in controversy their Lordships have to embark on a survey of the law which, apart from its tediousness, is not free from inconsistencies.

In the Digest of U Gaung six classes of sons are said to be entitled to inherit the property of their parents. In the first category stands the son born of a union contracted with parental sanction, and is known as *orasa*. As religious formalities do not appear essential to lawful wedlock, this form of marriage is evidently regarded to constitute a valid marriage. The term *orasa* is admittedly borrowed from the Sanskrit *aurasa* used in works on Hindu Law and has been corrupted into *auratha* or *orasa*. Mr. Richardson, the translator of the *Manugye Dhammathat* uses the word *auratha*, and Mr. Justice Heald, of the Chief Court, adopts the same spelling. Whether the word is spelt *auratha* or *orasa* it undoubtedly denotes a son born of a union contracted with parental sanction ; in other words, a legitimate son. In course of time, judging from a comparison of the enunciations in the *Dhammathats*, it acquired a special meaning ; it came to signify a son who, by virtue of his position in the family and his competency to assume the duties of the father, was vested with a defined right in the parental estate. Similarly, in the course of time, as the *Dhammathats* show, the word was extended to include a daughter standing in the same position and vested with the same right.

The plaintiffs' case is that although Ma Nyein Aung was the eldest born daughter of U Baw and Daw Hmo, the appellant's father, Po Cho, as the eldest son, possessed the qualifications necessary for being vested with the status of an *orasa* son. They contend, and their contentions have been urged with great force before the Board, that, in the first place a woman is inferior to a man, and secondly, that the *Dhammathats* do not lay down the rule that the son who is vested with the

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status of an *orasa* son and acquires a preferential right to a fourth share of the family estate should be the eldest born, or, to speak more correctly, the first-born child. In support of their contention they rely on the provisions in the *Dhammathats* that in certain cases the younger son may be vested with the rights of the *orasa* or privileged son.

The suit was instituted in the Court of the District Judge of Hanthawaddy.

The substantial issue before him was whether Po Cho, who predeceased his father, acquired before his death the status of a privileged or *orasa* son and became thereby entitled to the preferential share of one-fourth in the parental estate, which he passed on to his children, the plaintiffs.

In using the term "privileged" their Lordships do not wish to introduce another element of complexity to a sufficiently perplexing question. They use it simply as a synonym for *auratha* or *orasa*.

Admittedly the entire property in dispute was acquired as stated in the plaint "during the marriage of the said U Baw and Daw Hmo," and thus husband and wife under the Burmese-Buddhist Law were entitled to equal shares in the property. If this fact is borne in mind much of the difficulty in the case would disappear.

The District Judge felt himself constrained by previous decisions in the Burma Courts to hold that the plaintiffs had made out their claim and were entitled to a one-fourth share in the estate.

From the District Judge's decree the defendants appealed to the Chief Court. The appeal was in the first instance heard by a Division Bench consisting of Robinson, C. J., and Duckworth, J. In view of the fact that the decisions in previous cases were by no means consistent and having regard to the complexity and importance of the controversy in the present litigation, the learned Judges felt it advisable to refer the points at issue to a Full Bench of their Court; and considering that the reference should be based on specific questions, they submitted to the Full Bench six questions, which appear to cover a far larger ground than perhaps was actually necessary for the decision of this case.

It is interesting, however, to note the questions, as they furnish the key to the major part of the decisions of the Full Court. They are as follow :—

"1. In a family consisting of both sons and daughters, can any child acquire the full status of *orasa* prior to the death of either parent?

"2. If so, in such a family where the eldest child is a daughter, can any son become *orasa* until his father dies?

"3. In such a family, can the question which child is the *orasa* be decided before the death of either parent?'

"4. Can there be in such a family two *orasas*?

"5. Are sons always to be preferred to daughters as *orasa*?

"6. In such a family, can there be an *orasa* son who, predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate?"

The matter thus came before a Full Bench of five Judges. Although some of them considered the questions rather wide in view of the actual facts of the case, all concurred substantially in the answers which Mr. Justice Maung Kin gave. His answers are as follow :—

"Question 1—in the affirmative.

"Question 2—Where the eldest child is a daughter, no son can become *orasa*.

"Question 3—in the affirmative.

"Question 4—in the negative.

"Question 5—in the negative, unless the son is the eldest born.

"As regards Question 6, I may say that the word 'transmit' is not quite a happy term. The eldest born son is the *orasa*. If he predeceased his parents, his children will have a right to preferential treatment as laid down in the first paragraph of S. 15 of the *Manugye*, or S. 162 of the Digest. If the eldest born son died before he became competent to take his father's place, a younger son, being fully qualified, may become *orasa*, and, if that son had predeceased his parents, his children will have a right to the same preferential treatment. But if the eldest born child was a daughter and predeceased her parents after she had become competent to take her mother's place, her children will have a right to the same preferential treatment. It is doubtful whether another daughter, younger than a son, can ever take the place of the eldest born daughter who is not competent or died before she became able to take her mother's place."

On receiving the answers to the questions submitted, the Divisional Bench reversed the decree of the District Judge and awarded a decree to the plaintiffs in respect of a one-sixteenth share of the estate, in lieu of the one-fourth that had been given to them by the Court of first instance. From this decree the present appeal has been preferred, and the arguments which were pressed in the Chief Court have been forcibly addressed to their Lordships.

Three principal grounds have been urged in support of the plaintiffs' claim, and on these grounds the correctness of the

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judgments of the Full Bench is challenged. First, that the *Dhammathats* do not, when speaking of an *orasa* son, lay down any rule that he should be the eldest or first born of the children. Secondly, that a daughter, by the rule in the *Dhammathats* relating to the inferiority of the female sex in relation to the male, can never be the *orasa* child ; and, thirdly, that when there is a son, a daughter cannot be an *orasa* child, which appears to be only a branch of the second argument.

Before referring to the judgments of the Full Bench, their Lordships desire to state the result of their own examination of the *Dhammathats*.

In respect of the first proposition advanced on behalf of the plaintiffs, viz., that in the *Dhammathats* the status of *orasa* is not confined to the eldest or first born, it appears to their Lordships that the argument is based upon a misconception of the rules laid down in the Burmese-Buddhist Law. Chapter 6 of the Digest deals with the subject of partition between parents and their own children, *i. e.*, descendants of the first degree. S. 30 relates to partition between mother and son on the death of the father. All the *Dhammathats* agree that on the death of the father the eldest son should be entitled to a one-fourth share of the estate, and that the mother should be entitled to the remaining three-fourths for herself and her younger children. The *Vilasa* states as follows :—

"On the death of the father the rule of partition between mother and son is as follows :—

"If the son is the eldest born and if he helps the parents in the acquisition of the family property, he shall get his father's elephant and pony, together with their keepers ; the cup, spear, tray and plates used by his father ; the clothes, ornaments, and belt worn by him ; the lands held as an appanage of his office ; the town or village, the usufruct of which he enjoyed, and the office held by him. The mother shall get her belt, finger-rings, bracelets, ear-rings, necklaces, combs, betel-box, stool and personal ornaments given her during the father's lifetime. The remainder, such as gold, silver, bullocks, buffaloes, goats, pigs, fowls, ducks clothes paddy-rice Indian-corn, peas, millets, barley, sessamum, cotton and household furniture shall be divided into four shares ; the mother shall get three shares and the son one share. Even if there are ten sons, only one-fourth shall be given them."

The *Kaingza* states the rule thus :—

"The reason why the mother gets three shares is that when the property was being acquired, the son was not yet born, and after he was born he could not (during his minority) do anything towards the retention of what was already acquired ; even the father can merely acquire, but cannot prevent waste. It is the mother alone who takes care of the property."

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In the *Myingun* the rule is stated in the following terms :—

"If the son is one who is competent to assume the father's responsibilities, and is known to the local authorities, he shall get his father's pony, drinking-cup, betel-box, sword, lands held as emoluments of office, lands worked by him, personal ornaments and wearing apparel, cups, trays, spoons and plates, spears large and small, armour, and such other articles worn by men only. Stored-up grain, bullocks, buffaloes, slaves, fowls, pigs and utensils shall be divided into four shares ; the mother shall get three shares and the son one share."

The *Manugye* states the principle in identical terms (1). It declares that on the father predeceasing the mother, the estate, after the apportionment of the specific articles as laid down in the *Dhammathats,* should be divided into four shares out of which the " eldest son " should be entitled to one share and the mother and " younger children " to three shares. In S. 12 it declares that when the mother dies in the life-time of the father the same rule should apply to the " daughter's" claim to share in the estate.

It is unnecessary to refer to the passages in the other *Dhammathats* as set out in the Digest relating to the right of the " eldest son " to a one-fourth share on the death of the father, as they state the rule substantially in the same terms.

On these rules the question arises, who is the son who becomes entitled to this right ? The respondents' contention is that this special right is given to the *eldest born* son, while the appellants urge that the words " eldest son " are not restricted to " the eldest born, " but applies equally to a son who, in a family consisting of a number of children of both sexes, stands in relation to them as the eldest son. And on this ground they contend that Po Cho was the " eldest son " and entitled to the one-fourth share as *orasa* son.

The answer to the question, however, is furnished by the *Dhammathats* themselves. The reason why the mother becomes entitled to a three-fourth's share in the estate in which she and the deceased father held equal shares explains also who " the eldest son " is who becomes entitled to the one-fourth share.

The *Mano Dhammathat* explains the reason why the mother gets the three-fourth's share in these terms : —

"The mother gets three shares because while the property was being acquired the son was not yet born, and when acquired the mother is the only person to take care of it and prevent it from being wasted."

1. Richardson's Translation, Book X, S. 6, p. 273.

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The *Dhammathat-pyu* gives it thus :—

" On the death of the father the partition between mother and son shall be as follows :—

It states the question first, " Why should the mother get three shares ? " and then gives the reply :—

" Because during the early days of her wedded life, while family property was being acquired the son was not yet born and whatever was acquired by his father the mother took care of and laid by. Hence the mother shall get three shares, she being the principal agent in the acquisition of the family property. "

The *Vilasa* declares that on the death of the father the rule of partition between mother and son is as follows. It specifically states : " If the son is the eldest born," and " if he helped the parents in the acquisition of the family property, he shall get his father's elephant, etc. The remainder of the estate shall be divided into four shares—the mother shall get three shares and the son one share "

and to the question, " Why should the ' eldest born child ' get a fourth share ?" the answer is :—

" the parents obtained the child at the commencement of their wedded life by their earnest prayer and acquired the property with *his* or *her* assistance. "

What can all this mean, except that " the eldest son " referred to in all the *Dhammathats* is *the eldest born child* of the wedded pair.

In S. 33 of Mr. Gaung's Digest the rules of the *Dhammathats* referring to the rights of the " eldest daughter " in the family estate on the death of the mother are set out at length. These rules require careful analysis and consideration in conjunction with the rules relating to the rights of the son on the death of the father, leaving the mother surviving him.

A comparison between these rules regarding the son's rights and the daughter's rights will elucidate still more clearly what is meant by the " eldest son " or the " eldest daughter " in the *Dhammathats.*

S. 33 deals with the subject of partition between father and the eldest daughter on the death of the mother, as happened in the present case. Daw Hmo died before her husband, leaving Ma Nyein Aung, the eldest born child of the marriage. Her status and her rights are clearly stated in the *Dhammathats.* The *Manugye,* the authority of which has been recognised by the Board, after setting out the specific articles belong-

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ing to the mother or in her sole use in her lifetime, such as ear-rings, bracelets, belt, cups for eating and drinking, clothes and ornaments worn by women to which the eldest daughter became entitled, states the rule as to the partition of the residue of the family property between the surviving parent, the father, and the eldest daughter thus (2) :—

Partition between father and daughter on the death of the mother.

"Let the father have his riding elephant and horse, his goblet, the slave who carries his water and betel, his sword, betel apparatus, clothes, and ornaments. Let the daughter have her mother's ornaments, clothes, and the slave who cooked her rice ; and having divided the residue into four shares, let the daughter have one and the father three."

In the *Kungyalinga* the rule is stated in the following terms :—

"The mode of partition between the *orasa* daughter and father on the death of the mother is, *mutatis mutandis,* the same as that between mother and son on the death of the father."—*The Digest,* p. 88

In the *Warulinga* it is as follows :—

"The mode of partition between father and daughter on the death of the mother is, *mutatis mutandis,* the same as that between mother and son on the death of the father. The daughter shall get in addition her clothes, ornaments and goldflowers, one female slave, and her mother's personal belongings, just as the son gets his father's personal belongings."

The *Cittara* states the rule thus :—

"The mode of partition between father and *orasa* daughter on the death of the mother is, *mutatis mutandis,* the same as that between mother and son on the death of the father."

The *Kyetyo* gives the rule more fully :—

"The mode of partition between father and *orasa* daughter on the death of the mother is as follows :—

"The daughter shall get her anklets, bracelets, ear-rings, belt, necklaces, etc., given her during the mother's lifetime, and by both parents, these having become her separate property. She shall also get her mother's belt, necklaces, combs, finger-rings, ear-rings, bracelets, betel-box, cushions, and other personal ornaments. The ornaments worn by the daughter during the mother's lifetime shall go to her. The rest of the property such as gold, silver, copper, iron, slaves, buffaloes, bullocks, goats, pigs, fowls, ducks, paddy, rice, Indian corn, millets, barley, sessamum, cotton and household furniture shall be divided into four shares ; the father shall get three shares and the daughter one share."

"The above rule applies when the daughter is the eldest born. The younger daughters shall get their shares only on the death of both parents."

And then comes this important question (3) :—

"Why should the mother get three shares and the eldest child only one share ? Because the mother saves the property acquired by the father

2. Richardson's Translation of *Manugye*—Book X, S. 3, p. 271.

3. *Kyetyo,* S. 33.

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and thereby accumulates it at the early period of her wedded life, before the eldest child was born ; and during the minority of the eldest child, before he or she could assist the parents the mother accumulates the property acquired by the father. The eldest child gets one share because he or she upholds the parent's position and rank and continues the family. Having to bear the children, the mother has not the heart to make them work, nor can she see them suffer privation ; she cherishes them and brings them up. Children lie under greater obligation to the mother than to the father. Hence the mother gets three shares and the son one share. Should the property enumerated above be exhausted by the mother for her sustenance or in performing works of merit, let it be so. The sons shall not also claim the residue of the property to which the mother alone is entitled."

It is to be specially noted that the words here used are "eldest child," clearly indicating that the expression includes children of both sexes.

This passage from the *Kyetyo* shows not only that on the death of the mother the eldest born daughter is entitled to a one-fourth share, but it also explains why she becomes so entitled. The eldest born daughter steps into the shoes of the mother, assumes her responsibilities, manages the household and takes care of the younger children like the mother, and is confirmed in the status of the *orasa* child. The status does not depend on the decease of the father, where the child is a son; or of the mother, where it is a daughter ; it comes into existence on the fulfilment of three conditions, viz.: (1) that he or she is the first-born child ; (2) that it attains majority ; and (3) helps either in the acquisition of the family property and the discharge of the father's responsibilities; or, if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother's duties.

In their Lordships' judgment, although it is not easy always to reconcile the inconsistencies with which the *Dhammathats* bristle, upon a careful comparison of the different enunciations so laboriously brought together in the Digest, the following propositions clearly emerge from the rules propounded in the *Dhammathats*, viz., that the designation *orasa* in not limited to a son and that it connotes the eldest or first-born child who is competent to undertake the responsibilities of the deceased parent.

The grounds on which "the eldest child" may be "superseded" or displaced from his or her status are collected in S. 62 (p. 117) of the Digest. When a son is incompetent to assume the duties and responsibilities of the father, either from physi-

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cal defects or otherwise, it is declared that the next brother should step into his shoes. Supposing there is a daughter intervening between the two sons, viz., the first born and the next born son, she could not possibly be the *orasa* child. The law does not say that on the mother's death a daughter who was not the eldest or first born should become the *orasa* child and become entitled to a preferential share. As already observed, the provision is for the first born, whether male or female, if competent.

In the present case the mother died several years before the father ; it is not disputed that the eldest daughter, the first-born child, Ma Nyein Aung, assumed all her responsibilities. Nor is it disputed that she was quite competent to do so. It may be taken for granted that she looked after the conservation of the property as her mother did during her life-time and took care of the younger children. She was thus the *orasa* child of the marriage of U Baw and Daw Hmo. The second son, Po Cho, could never become the *orasa* child and could never acquire the status in his own right. There was no eldest born son whom he had superseded for " incompetency " or into whose shoes he had stepped on his death before attaining majority.

It is contended, however, that the sections dealing with partition between an elder sister and a younger brother on the death of the parents (Digest, S. 140) places the son on the same level as the elder daughter. The *Kyetyo* says :—

" If the eldest born is a daughter and the second child a son, let them share the estate equally between them."

The *Kyannet* makes the following statement :—

" If, after the establishment of a daughter as an *orasa,* a son is born they shall share the estate equally between them.

" If the elder daughter and the younger son are both childless, the estate shall not be divided equally between them, because the son is deemed the *orasa.*"

Similar statements occur in other *Dhammathats.* Their Lordships do not propose to undertake the task of trying to reconcile transparent inconsistencies. Whether the prescriptions to which the plaintiffs have referred as showing the superior right of a younger son to that of the elder daughter were actuated by a desire for a fair and equal division, it is difficult to say. It was certainly so in the case of one younger brother co-existing with the eldest born sister, even after she was installed as *orasa.* Whatever may be the reason of these inconsistencies, it is clear that these arbitrary

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rules of distribution cannot override or control the previous express provisions relative to substantive right.

Ss. 162 and 163 of the Digest deal with the rights of the children of the eldest son or eldest daughter dying before the parents. S. 162 is headed thus :—

"The eldest son dies before the parents ; the son of the deceased is entitled to the same share as his father's youngest brother."

And S. 163 has the following heading, clearly indicating the subject dealt with in the section :—

"The eldest daughter dies before the parents ; the deceased's child is entitled to the same share as the deceased's youngest sister."

The *Manugye,* in S. 15, Book X, states the rule as to the devolution of the share of the eldest born son or eldest born daughter on his or her predeceasing the parents :—

"If the eldest son dies before his father and mother, the law of inheritance between his son and his son's uncles and aunts is this : because in case of the death of father and mother the eldest son is called father, let his son, and his (the eldest son's) younger brothers, share alike.

"Should the eldest daughter die before the father and mother, this is the law for the partition of the inheritance between her daughter and her daughter's uncles and aunts : that the daughter of the eldest daughter and her (the eldest daughter's) younger sisters shall share alike, because the eldest daughter, when grown up, stands in the place of a mother.

"In case of the death of the younger children occurring before the parents the law for partition of the inheritance between their children and the (co-heirs) relations of their parents is this : the children of the deceased have one-fourth of the share which would have come to their parents."

The *Vilasa* declares that " the eldest son of a deceased *orasa* shall receive as much of the inheritance as the youngest of his uncles. But the younger sons should receive only a quarter as much. Because a son is a nearer kin than a grandson, the latter shall not receive out of the estate of his grandfather as much as the co-heirs of his deceased father."

The prescriptions in most of the other *Dhammathats* are substantially the same.

These sections clearly refer to the rights of the children of the eldest born son or eldest born daughter. Po Cho did not belong to this category, and he had no right to the one-fourth of the estate to pass to the plaintiffs.

S. 164 refers to the shares of the children of one of the younger children predeceasing the parents.

"The child of a (deceased) younger son shall receive one-fourth of the share to which the deceased was entitled. He or she shall not receive an equal share with the aunts and uncles.

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"The child of a (deceased) co-heir who was not the eldest shall receive a quarter of the share to which the deceased was entitled. The remaining three-fourths shall revert to the estate."

This is the conclusion at which their Lordships have arrived upon an independent review of the *Dhammathats*, and the view of the law that has forced itself upon them is supported and confirmed by the detailed and scrupulously careful examination to which the provisions of the Burmese-Buddhist Law have been subjected by the learned Judges of the Chief Court. Maung Kin, J., who is himself a Burmese, conversant with the Burmese language and customs, and well versed in the Burmese-Buddhist Law, has fully discussed the rules of the different *Dhammathats* concerning the questions with which the Court had to deal. In the course of his judgment he says :—

"All the *Dhammathats* mentioned in S. 30 of the Digest, when considered as a whole, lead to the inference that it is the eldest born legitimate son who is entitled to claim a quarter of the parental estate from his mother on the death of the father, provided he has helped the parents in the acquisition of property and takes the deceased father's place and continues the family. It appears that the *Dhammathats* take it for granted that the son, if competent to do so, will take his father's place and continue the family ; but "whether this duty is a mere moral obligation or can be enforced at law is at present undetermined so far as decisions go." And this eldest born son, who is entitled to a quarter share, is by later *Dhammathats* called an *orasa*."

and he then makes the following comment on the argument against the view he has just expressed :—

"It may be argued that what is material is the fulfilling of the conditions and not the order in which the sons are born, so that even where the eldest born is a daughter a son who fulfils the conditions would be entitled to the quarter share from the mother on the death of the father.

"In my judgment the argument is not sustainable. It can only be founded on the *Dhammathats* noticed above which do not call the son entitled to the share by any description, such as Tha-u, thagyi, thagyi auratha or auratha, but which describe him only as the son who bears the father's burden or responsibilities. It appears to me that these *Dhammathats* put the matter in a comprehensive form, because whether the claim is made by the eldest born son or by a younger son, the conditions must be fulfilled. These *Dhammathats* do not, in my opinion, contradict the proposition that the eldest born son, if competent, can claim the share from the mother, and if not competent, he will be superseded by another son who is competent ; but that if the eldest born is not a son, the right to a quarter share does not exist in favour of a son though he may be the eldest of the sons. I have deduced this by a consideration of the *Dhammathats* alone."

And his conclusion is as follows :—

"It has, however, been urged that, as the *Dhammathats* look upon the son as being superior to the daughter, the eldest born daughter cannot be al-

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lowed to claim the quarter share where there are sons. Among others, Ss. 140 and 150 have been referred to in support of the contention. These sections and the others contain rules of distribution after both the parents are dead. These are the rules which this Court has disregarded in *Ma Kyi Kyi's case* (4). They do certainly show that the son is regarded as superior to the daughter. But they do not give him, unless he is the eldest born, any greater share than the eldest of the daughters. For if the eldest is a daughter and there is a son younger than she is, that son, instead of getting a smaller share in accordance with the order of the births of the children, gets a share equal to the eldest daughter, and in my judgment wherever, in these rules, the word *auratha* is used, it is used to indicate the eldest child but not with reference to the right to claim a quarter share from the surviving parent. When both the parents are dead the question is not who is the eldest born but who is eldest of the surviving children, and all the surviving children get their fractional shares, larger or smaller, according to the priority of birth."

Maung Kin, J., refers to his own experience of the meaning attached by the Burmese people to the position of the eldest daughter. His remarks deserve attention :—

"There is an additional reason why these rules of distribution of inheritance after both the parents are dead do not apply to cases where the eldest daughter claims a quarter share from her surviving parent, the father. It is that the claim is allowed her under very special circumstances, and as a reward for her past assistance in the acquisition of property and the possibility (which the law-givers expected in the times they lived) of her taking her mother's place and continuing the family and controlling the younger children as her mother had done in her lifetime. In the extract from *Dhammathatkyaw* which is given in S. 62 of the Digest we find the principle. . . . The eldest brother is in the position of the father, the eldest sister in the position of the mother. This is in the mouth of every Burman, and it is clear from the fact of the principle being recorded in that *Dhammathat* word for word the same as it exists in the mouth of the people that it is a well recognised principle. And so far as my experience goes the principle has never been taken to mean that in the case of the eldest daughter, only her younger sisters give her the position of their mother. The younger brothers also respect her as they had their deceased mother. This happy state of things exists to-day and long may it continue.

"Another point is that even if those rules of distribution among all the children are applicable to the question of the eldest daughter's right to a quarter on the death of her mother, the younger son cannot take her place, he can only prevent her from claiming the right. Then in that case there would be no *orasa* at all, a position which the *Dhammathats* can hardly be held to have contemplated.

"In my judgment it is really unnecessary to go into the question of the applicability of these rules because it is perfectly clear, as shown above, that the *Dhammathats,* in giving a quarter to the eldest child, have in view the case of there being both sons and daughters in the family."

The Burmese adopted the Buddhist religion, which was imported from India, and with the religion they also seem to have received the Indo-Aryan conception of the superior rights of men. And Mr. Justice Maung Kin thinks that the

4. (1905) 3 L B R 8.

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Hindu notion of sex superiority found its way among some of the text-writers. There appears to be considerable force in his observations, as will be seen from the use in the *Dhammathats* of various legal terms borrowed from the Sanskrit. Gradually, as the compilers of the *Dhammathats* absorbed the national customs and usages, the sex equalisation, which is the dominant feature of the Burmese law, prevailed, and the later *Dhammathats* show that the eldest born son and the eldest born daughter stand on the same footing.

With reference to this subject the learned Judge makes the following remarks :—

"Among the Burmese-Buddhists equality of the sexes is recognised in the *Dhammathats* with occasional aberrations to the effect that the male is superior to the female. But when we come to consider what superior rights are given to the man we find that his rights are hardly superior to the woman's. Although they borrowed their laws from the Hindu Institutes of Manu, the Burmese carefully refrained from adopting the sex inequalities of the Hindu Law. For instance, in Hindu Law, the term *aurasa* was applied originally only to the legitimate son. Next the Rishis evolved him into a son of a very superior type, namely, the son begotten by a man of a wife of the same caste who was espoused in an approved form of marriage with religious rites,was a virgin at the time of her marriage and had not passed through the marriage ceremony or a part of it with another man. This was done on spiritual grounds. In Hindu Law a daughter is not called an *aurasa* and is not allowed to confer spiritual benefits on her father as the *aurasa* son is."

"The Burmese borrowed the word *aurasa* and Burmanized it as *auratha*, but gave their own meaning to it suitable to the conditions of family life which they approved. Thus they called a child (son or daughter) born in lawful wedlock an *auratha* child, putting the son and daughter generally on an equal footing."

and he winds up by saying :—

"In the result I would hold that the eldest born legitimate daughter has the right to claim a quarter share on the death of her mother whether she co-exists with sons or not, and that the eldest born child is the *orasa*, although, as regards the claim to a quarter share on the death of one of the parents, it would depend upon the circumstances of each particular case whether the claim can be made or not, that is to say, if the child is a son, he can only make the claim from the mother, on the ground that he steps into his deceased father's place ; similarly, if a daughter, she can only claim as one who takes the place of her mother. It is clear also that there cannot be two *orasas*, a male and a female, in the same family, because an *orasa* is either the eldest born or the one who supersedes the eldest born."

His decision is practically embodied in his answer to question 6, already quoted.

Pratt, J., who followed him in delivering judgment, substantially agreed with his Burmese colleague.

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Heald, J., deals with the facts and the law of the case with equal care and minuteness. He reviews in great detail the *Dhammathats* and the decided cases of the Burma Chief Court. He expresses his dissent from those which accorded the superior position to the younger son in preference to the eldest born daughter, and gives his reasons therefor. His experience of the country and of the people extends over twenty years. In his general conclusion he is in agreement with Maung Kin, J. He holds that *auratha* or *orasa* is applied to both eldest born son and eldest born daughter; and states that this view is clear from the enunciations of most of the *Dhammathats*. He reviews the *Dhammathats* according to their antiquity. He refers to the *Vilasa*, which was compiled in the twelfth century, and to the *Wagaru* in the thirteenth century, where the term *auratha* or *orasa* are applied to both eldest son and eldest daughter. He states that in the *Dhammathats Kyaw* and the *Kyangsa*, written in 1630, the same expression occurs, so also in the *Vaicchaya* of 1775. He refers to U Gaung's authority, who is, as already stated, the author of the Digest. Heald, J.'s conclusion is :—

"From the above survey of the *Dhammathats* I think that it is fairly clear that the word *auratha* is commonly used to mean the eldest child, whether son or daughter, and that if the eldest child, being a son, is competent on the father's death to take the father's place in the family, or, being a daughter, is competent on the mother's death to take the mother's place, then he or she is *auratha*, and on the father's or mother's death, is, according to the *Dhammathats*, entitled to the father's or mother's personal property and to one-fourth of the rest of the estate, and, further, that if the eldest child, whether son or daughter, dies without having become entitled to that interest in the estate, his or her children are entitled to share equally in the estate with the younger brothers and sisters of the deceased."

Dealing with the inconsistent statements in some of the *Dhammathats* showing a certain preference for sons in relation to the eldest daughter, he says as follows :—

"The *Vicchedani*, when dealing with the partition between brothers and sisters after the death of both parents, actually says : 'Though the eldest child be a daughter she does not reach the status of *auratha* and she must share equally with her younger brother,' and one or two of the minor *Dhammathats* contain similar passages, which I have no doubt were taken from some old books and reproduced Hindu or possibly pre-Hindu ideas. But just as the *Dhammathats*, when translating passages which are evidently taken direct from what may be called the Hindu Law books, use *auratha* in its original sense of 'legitimate' and, nevertheless, when they come to apply it to Burmese Buddhist Law use it in the special sense of 'an eldest born child who is competent,' so, although they reproduce passages which follow the Hindu Law in saying that a daughter can never be *auratha*, nevertheless when they come to the actual

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division of the property of the estate of a Burmese family they put the daughter practically, and in some cases entirely, in the same position as the son."

Duckworth, J., and the Chief Justice adopted the views of Maung Kin, J. Duckworth, J. says :—

"It is perfectly clear that S. 163 of the Digest applies to families consisting of both sons and daughters. Among the Burmese people generally, there is no doubt that the eldest legitimate child, whether it be a son or daughter, is regarded as taking the place of the parent of the same sex when that parent dies."

Their Lordships do not feel called upon to discuss in detail the decisions of the Burma Courts cited at the Bar, as they agree generally with the observations of the Judges of the Full Bench.

In so far as those decisions expressly or by implication are adverse to the rights of the eldest born daughter, their Lordships have no doubt proceeded on an insufficient consideration of the status assigned to the first-born child by the Buddhist-Burmese Law as embodied in the *Dhammathats*, and expressed in the existing customs and usages to which Mr. Justice Maung Kin so forcibly refers.

The eldest born child occupies an extraordinarily favoured position as compared with the younger children, inasmuch as the parents, to use the quaint language of the *Vilasa*, "obtained the child by their earnest prayers at the commencement of their wedded life, and acquired the property with his or her assistance."

These considerations have led their Lordships to the conclusion that in the present case Po Cho, being a younger child, although the eldest son, did not acquire the status of *orasa* and did not become entitled to the privileged position allotted to the eldest or first-born son. In these circumstances the judgments of the Full Bench and the decree of the Chief Court appear to their Lordships to be perfectly right, and they are of opinion that this appeal fails and should be dismissed. In view, however, of the importance of the case and the difference of opinion prevailing until the decision of the Full Bench on the questions at issue, their Lordships think that the costs of both parties should come out of the estate. And they will humbly advise His Majesty accordingly.

Solicitors for appellants : *Light* and *Fulton*.

Solicitor for respondents : *Douglas Grant*.

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD DUNEDIN, LORD ATKINSON, MR. AMEER ALI AND LORD SALVESEN.

Raja Sasi Sekhareswar Roy Bahadur ... *Appellant**

v.

Lalit Mohan Maitra, since deceased ... *Respondent.*

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Raja Sasi Sekhareswar Roy Bahadur *v.* Lalit Mohan Maitra.

Arbitration—Award filed in Court—Decree based on—Allotment of properties—Suit for possession of properties allotted—If lies—Execution of decree—Limitation.

A disputed claim to lands was submitted by the parties to arbitration; the award given therein was filed in Court and based on the award a decree was passed allotting certain specific properties to each of the parties. One of them without executing the decree and getting possession of the items allotted to him within the period allowed by law, filed a suit for possession. *Held,* the remedy being in execution, the suit was not maintainable.

Obiter.—If after the award the parties had obtained possession of the properties allotted to each of them and subsequently one of them trespassed on the lands allotted to the other, a suit could then be founded on the award itself and not upon the decree following it.

Appeal from a judgment and decree (30th November, 1921) of the High Court of Judicature at Fort William in Bengal, which reversed a judgment and decree (28th February, 1920) of the Officiating Subordinate Judge of Rajshahi, decreeing the plaintiff's claim.

The plaintiff was owner of Towzi Mahal No. 197, and the defendant was owner of Towzi Mahal No. 13, of the Malda Collectorate. They were in joint and undivided possession of the villages appertaining to their respective estates, and had differences. They appointed the Collector and District Magistrate of Malda as arbitrator to settle their disputes, and to partition the villages between them. The arbitrator delivered his award on the 10th June, 1905, allocating certain specified villages to the plaintiff, and other specified villages to the defendant, and directing that the rents and profits of the apportioned villages were to belong to and be payable to the respective owners under the award as from the 17th July, 1905. On the 9th July, 1917, the plaintiff instituted the present suit in the Court of the Subordinate Judge of Rajshahi, claiming possession of the lands allocated to him by the award, and mesne profits, and alleging that the cause

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of action arose on the 17th July, 1905, the date fixed by the award for effective possession. The defendant, by his written statement, pleaded *inter alia*, that the award having been filed in Court under S. 526 of the Civil Procedure Code, 1882, and a decree in accordance with it made on the 17th March, 1904, no separate suit would lie on the same cause of action, and the remedy of the plaintiff was by execution only. The plaintiff not having executed that decree within three years of that date, his suit was barred by limitation.

The Subordinate Judge (N. K. Mitra, Esq.) on the 28th February, 1920, made a decree in favour of the plaintiff which, however was, on appeal, reversed, and the suit dismissed by the High Court (Woodroffe and Ghose, JJ.) on the 30th November, 1921. The plaintiff thereupon appealed to His Majesty in Council.

Sir George Lowndes, K. C. and *B. Dube* for appellant.

L. de Gruyther, K. C. and *Parikh* for respondent.

31st October, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—In this case a question has arisen between two Zemindars. They were in possession of certain properties in what may be called a very uncomfortable manner, that is to say, they possessed certain lands in common, and the way of possession was a very uncomfortable way. One got the rents of certain tenants, and the other got the rents of others, and sometimes they both went to the same tenant and each realised a portion of his rent. In order to get rid of this inconvenient situation, they agreed to arbitration ; an arbitration was accordingly held, and the arbitrator allotted certain villages to one, and certain villages to the other. Thereupon possession to a certain extent was taken in accordance with the award. The present suit was raised by the plaintiff, and the object of the suit was to get possession of certain lands which he said were his under the award, and of which the defendant was in improper possession. He makes a plain averment in the plaint. He says, after setting out the fact of the award and the finding, " But in spite of his "—that is the defendant—"being bound in accordance with the provisions of the said award and the decree passed upon it to give up to the possession of the plaintiff" certain lands, "the defendant has not done so. The defendant is not entitled and has no right

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to enjoy and possess the lands mentioned" in the three schedules annexed. For relief he asks "That on declaration that the lands mentioned in the three schedules are lands depicted in the Revenue Survey maps of Mouzahs Lakshmipur, Bilborendra and Begpur respectively, and (on declaration) of the plaintiff's right on the basis of the aforesaid award and the decree passed upon it to get possession of the same, the plaintiff may get decree for khas possession of the same on eviction of the defendant from all these lands." The answer that is made by the defendant, and which has been given effect to by the Court below is that if what the plaintiff says is true, the defendant (plff. ?) ought to have executed the decree which he got and not have allowed that decree to become null by reason of limitation. The question, therefore, resolves itself into this : Could he on the statement of the facts now made have at the time got execution upon the decree ? The decree was filed in Court, and the order of the Court is this : "It is ordered that the suit be decreed in the terms of the award annexed herewith." The effect of that is not doubtful. It is a decree which so to speak sets out again the words of the award. The words of the award, after going into the matter of the boundaries of the land and describing them, are these : "I further decide that the parties will collect rents and other profits" from a certain date "and that each of the two parties above named will deliver respectively to each other all the Zemindari papers which they may have in their possession." If it is the fact, as the plaintiff says in his plaint, that the defendant did not give up possession, the way in which the plaintiff was kept out of the lands which he ought to have had can only have been one of two ways : Either it was that a cultivating tenant was on these lands and paid rent to the defendant instead of to the plaintiff as he ought to have done, or else, if there was no tenant then it must have been that the plaintiff was kept out of the lands in a physical sense, that is to say, he was not allowed to go on to them. It seems to their Lordships to be plain that in either of those cases an appropriate warrant could have been got from the Court upon a decree framed in the terms mentioned. That seems to end the case. It does not end perhaps all that might have been made of the case, because one can see that there might have been a case of this sort, and for aught their Lordships know this may really be the case. Some of these lands, how much exactly they do not

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know, but certainly a good proportion, were jungle lands, or lands under water, at any rate lands not in a fit state for cultivation. If after the award the parties went down to the ground and said : " Here are the boundaries that have been settled by the arbitrator ; this is my land, and that is yours, " and then went away and nothing happened as regards this waste or watery land, and neither party went on to it and possessed it, and then, after the expiry of the limitation years upon the judgment on the award, the defendant by means of a tenant went in upon those lands and began to cultivate them, and took the rent from the tenant, who was so put in, it is quite clear that the plaintiff could then have come and asked the assistance of the Court. He would have founded upon the award itself and not upon the decree following upon it, and to that there would have been no answer. But unfortunately, although there is, one may almost say more than a hint that that is the true state of the case, that is not the case that was made, and it is a case obviously that would not only have had to be averred but proved, and there might and probably would have been a great deal of evidence on one side and on the other. It is too late now for their Lordships to take up that case. They will, therefore, humbly advise His Majesty that the appeal must be dismissed with costs.

Solicitors for appellant : *Barrow, Rogers* and *Nevill.*

Solicitor for respondent : *E. Dalgado.*

A. de M. —— *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Allahabad).

PRESENT :—LORD DUNEDIN, LORD CARSON AND LORD DARLING.

Saiyid Manzur Hasan and others ... *Appellants**

v.

Saiyid Muhammad Zaman and others ... *Respondents.*

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Highway—Right to hold religious processions on public highway—Regulation of traffic—Right of suit—Special damage.

Members of a religious body possess the right to conduct a religious procession with its appropriate rites and observances along a public highway. Such a right is not exclusive, but subject to the orders of the local authorities regulating the traffic and the rights of the public.

A civil suit lies against persons infringing such right or preventing the

*P C Appeal No. 25 of 1923. 13th November, 1924.

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regular conduct or progress of such processions, without proof of any special damage other than the obstruction of the procession.

Parthasarathy Aiyangar v. *Chinnakrishna Aiyangar*, I L R 5 M 304; *Sundaram Chetti* v. *The Queen*, I L R 6 M 203; *Sadagopachariar* v. *A. Rama Rao*, I L R 26 M 376; and *M. Abdul Hafiz* v. *Latif Hossein*, I L R 24 C 524 approved.

Vijiaraghava Chariar v. *King-Emperor*, I L R 26 M 554 referred to.

S. V. Kadir Sausare v. *I A V Mirza Aga*, I L R 2 Bom 457; *K Sujaudin* v. *Madhavdas*, I L R 18 Bom 693; and *Baslingappa* v. *Dharmappa*, I L R 34 Bom 571 disapproved.

Appeal from a decree of the High Court of Judicature (30th May, 1921) which reversed a decree of the Second Subordinate Judge of Aligarh (10th September, 1918) decreeing the plaintiffs' claim.

The plaintiffs, on behalf of the Shiah community of Aurangabad, instituted this suit on the 16th May, 1918, in the Court of the Second Additional Subordinate Judge, Aligarh, against the defendants, as representing the Sunni community in the town, praying for (*a*) a declaration and notification of the fact that the plaintiffs, along with other Shiah residents of Kasba Aurangabad, were entitled to stay and perform the *matam* ceremony in a circle on the public thoroughfare at the back of the newly-built Jama Masjid, and that the defendants had no right or title to obstruct or stop the same at any time; (*b*) a permanent injunction against the defendants ever so interfering or obstructing them; and (*c*) any other relief which may be deemed equitable. The rest of the facts appear from the judgment of their Lordships.

On the 10th September, 1918, the Additional Subordinate Judge (L. G. Mukerji, Esq.) delivered judgment, dismissing the claim for damages but decreeing the rest of the claim and he continued: "I hereby declare that, subject to the orders of the local authorities regulating the traffic, the plaintiffs have the right to make short stays in the lane at the back of the Jama Masjid at Aurangabad for the performance of *matam*, and I hereby enjoin the defendants specifically mentioned in the plaint (by names) from interfering with the said performance."

The defendants appealed to the High Court of Judicature at Allahabad, and the plaintiffs filed cross-objections asking that so much of the decree as subjected their rights "to the orders of the local authorities regulating the traffic" should be deleted. On the 30th May, 1921, the High Court (Tudball and Sulaiman, JJ.) allowed the appeal, and dismissed the

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suit with costs, remarking that what the plaintiffs sought for was "absolutely inconsistent with the maintenance of the paramount idea that the right of the public is that of passage. In plain words, what they ask from the Court is a declaration that they have a right to block the passage in a very unreasonable manner."

The plaintiffs thereupon appealed to His Majesty in Council.

L. de Gruyther, K. C., W. Wallach and *Raj Rama Fatehsinghji of Limbdi* for appellants.

Sir George Lowndes, K. C. and *A. Majid* for respondents

13th November, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—In the town of Aurangabad there are two sects of Mohammedans, the Shiahs and the Sunnis. These sects worship in the month of Moharram in a different manner. In particular the Shiahs conduct a procession along with various emblems, which it is not necessary to specify, all alluding to the martyrdom of Hasan and Hosain, and as the procession proceeds they from time to time perform a ceremony called *Matam* which means that they stop for a little and wail. The Sunnis also revere the martyrdom of Hasan and Hosain but worship in a different way. In the town of Aurangabad from time immemorial the procession of the Shiahs has passed along a certain public road which passed behind the back of a mosque used by the Sunnis. In 1916 for the first time the Sunnis interfered with the procession and alleged that it disturbed their devotions in the mosque. A *modus vivendi* was arranged for a time. In order to prevent disturbances for the moment the magistrates passed a regulation for the year in question that there should be no performance of *Matam* within a certain distance of the mosque until the procession had passed a certain distance beyond the mosque. A similar arrangement was made in 1917. To bring matters to a crisis the Shiahs then, in 1918, raised an action in the Court of Aligarh, asking for a declaration of their right to go in procession and use *Matam* and for a perpetual injunction against the Sunnis again interfering with them. They also asked for damages. The action was opposed by the Sunnis. The District Judge granted the declaration that they craved, but subject to any order that from time to time the magistrates might make, and refused damages. Appeal was taken to the High Court by the

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defendants and the plaintiffs raised a cross-appeal asking that the rider as to the power of the magistrates might be deleted. The High Court reversed the judgment and dismissed the suit, holding that the plaintiffs had not made out any cause for a declaration. They treated the suit as a prayer to be allowed to block absolutely the highway, which, their Lordships considered, could not be allowed.

Leave was asked to appeal to the Privy Council and was granted by the Chief Justice and another Judge who had not heard the appeal, and it is abundantly clear from the observations which were made by them that they thought the question one of great importance.

The case seems to their Lordships to raise for authoritative decision the question as to the right of religious processions to proceed along the roads in India, practising their religious observances, and the decided authorities in India are certainly conflicting. The first question is, is there a right to conduct a religious procession with its appropriate observances along a highway ? Their Lordships think the answer is in the affirmative. In *Parthasarathi Aiyangar and others* v. *Chinnakrishna Aiyangar and others* (1) Turner, C. J., lays down the law thus :—

"Persons of whatever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace."

In *Sundram Chetti and others* v. *The Queen* (2) before a Full Bench the position was maintained, and it was further laid down that the worshippers in a mosque or temple which abutted on a high road could not compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there. At page 217 Turner, C. J., says :—

"With regard to processions, if they are of a religious character, and the religious sentiment is to be considered, it is not less a hardship on the adherents of a creed that they should be compelled to intermit their worship at a particular point, than it is on the adherents of another creed, that they should be compelled to allow the passage of such a procession past the temples they revere."

In *Sadagopachariar and others* v. *A. Rama Rao and others* (3), in a civil case, the same view was taken, but in a

1. (1883) I L R 5 M 304. 2. (1883) I L R 6 M 203.
3. (1902) I L R 26 M 376.

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criminal case in the same volume, *Vijayaraghavachariar* v. *King-Emperor* (4), two Judges held that to use a highway as a place of worship was not legitimate. One Judge, who had taken part in the former case, dissented and, at a former hearing, the Chief Justice had also dissented. The first of these cases came to this Board and no doubt was there thrown on the right of religious worship in a highway. Two other questions have, however, emerged. In several cases one sect claimed the exclusive use of the highway for their worship. This has been consistently refused. The other question, which goes deep into what ought to be done in the present case, is this :— " Does a civil suit lie against those who would prevent a procession with its observances ? " Here there is an obvious discrepancy between Bombay and Madras. and Calcutta upholds Madras. The leading Bombay authority is the case in *Satku valad Kadir Sausare* v. *Ibrahim Aga valad Mirza Aga* (5), Westropp, C. J. and Melvill, J. This was a suit by certain Mussulmans who carried *tabuts* in procession along a public road. They were disturbed in so doing by Mussulmans of a rival sect. The head-note sets forth the judgment accurately :—

> " Held, in special appeal the plaintiffs could not maintain a civil suit in respect of such obstruction unless they could prove some damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of the religious or sentimental gratification arising from carrying *tabuts* along a public road is not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action."

The judgment really proceeds entirely on English authorities, which lay down the difference between proceedings by indictment and by civil action.

In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English Law and ought not to be applied in India. This judgment was followed, as was natural, in *Kazi Sujaudin* v. *Madhavdas* (6), by two Judges. Nevertheless in the next case, *Baslingappa Parappa and others* v. *Dharmappa Basappa and others* (7), Sir Basil Scott, C. J. and Batchelor, J. disregarded the authority of their own Court in *Satku valad Kadir Sausare* v. *Ibrahim Aga valad Mirza*

4. (1902) I L R 26 M 554 : 13 M L J 171. 5. (1877) I L R 2 B 457
6. (1893) I L R 18 B 693. 7. (1910) I L R 34 B 571.

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Aga (5), and pronounced a judgment which, without saying that it overruled *Satku valad case* (5), clearly did so. The lower Court had followed *Satku valad case* (5), and dismissed the suit. The head-note is :—

"On second appeal by the plaintiffs, *held,* reversing the decree and allowing the claim, that the suit was not for the removal of a public nuisance but for a declaration of the right of an individual community to use a public road."

The Madras cases already cited were all cases (except the criminal one) in which declarations were sought and either granted, or, if asking for exclusive right, refused, but in none of them was the idea entertained of special damage other than the obstruction of the procession being needed.

In *Mohamed Abdul Hafiz and others* v. *Latif Hosein* (8) the Madras view was taken. The head-note is :—

"A suit for declaration of right to carry religious emblems in a procession through the streets of a village and for damages for preventing the plaintiffs from doing so, lies in the Civil Court."

Their Lordships are of opinion that the views of the Madras Courts are right and that the Bombay judgment is wrong. They think that the appellants are entitled to the declaration granted to them by the District Judge but propose to add to it, after the words "subject to the orders of the local authorities regulating the traffic" the words "to the Magistrate's directions and the rights of the public." If their Lordships were simply to dismiss the appeal the effect would be misunderstood in India. Every different sect or religion when places of worship or upon the routes where the processions of those with whom they do not agree pass, would appeal to the judgment as settling that the functions of the procession should cease as it passed them. But if the declaration as made by the District Judge is granted the Magistrates will still be able to make any arrangement they choose, and if they choose to, repeat the order that forbade doing *matam* within a certain distance of the mosque. That order would be an order passed in respect of special circumstances, not a general pronouncement as to rights.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the declaration granted as above indicated, and that the appellants should have the costs of the appeal before this Board, but inasmuch

5. (1877) I L R 2 B 457.

8. (1897) I L R 24 C 524.

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as in the Courts below they asked that there should be no declaration as to the Magistrates' right, no costs should be allowed to either party in the Courts below.

Solicitors for appellants : *T. L. Wilson and Co.*

Solicitor for respondents : *Douglas Grant.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL

(On Appeal from the Court of the Judicial Commissioner of Oudh.)

PRESENT :—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

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Ranodip Singh v. Parmeshwar Pershad.

Ranodip Singh and others ... *Appellants**

v.

Parmeshwar Pershad and others ... *Respondents.*

Hindu Law—Joint family—Suit to set aside father's alienation of ancestral property—Some of the plaintiffs born after the alienation—Limitation Act (IX of 1908) Ss. 6, 7 and 8 and Art. 126—"Person entitled to institute a suit"—"Time from which limitation is to be reckoned."

On the 23rd June, 1920, four brothers (of whom the eldest was born on the 23rd August, 1886, the second on the 4th August, 1891, the third on the 1st October, 1897, and the fourth on the 30th November, 1900) instituted a suit, claiming possession of a village which was the ancestral property of their joint family under the Mitakshara system of Hindu Law, and, therefore, that the sale deed in respect thereof executed by their father on the 3rd June, 1893, having been executed, as they alleged, without legal necessity and without benefit to the joint family property, was void.

Held, that, so far as the first and second sons were concerned, their claim was barred, under Art. 126 of the First Schedule, Limitation Act of 1908, on the expiry of 12 years from the 3rd June, 1893, the date when the cause of action arose, and from which limitation began to run ; that, as regards the other two plaintiffs, the action was also barred, and that Ss. 6, 7, and 8 of the Act did not prevent limitation running, as they only contemplated persons in existence at the time of the accrual of the cause of action, which these latter plaintiffs were not, they having been born after the said 3rd June, 1893.

Appeal from a judgment and decree (18th July, 1921) of the Court of the Judicial Commissioner (Dalal and Wazir Hassan, JJ.) which affirmed a judgment and decree (22nd March, 1921) of the Subordinate Judge of Bahraich (M. H. Khan, Esq.)

Both the Courts in India had held that, assuming as true the facts stated by the plaintiffs in their plaint, and recounted

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*P. C. Appeal No. 24 of 1923. 17th November, 1924.

P. C.

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in the judgment of their Lordships, the plaintiffs' suit was barred by limitation.

B. Dube for plaintiffs (appellants).

The respondents were not represented.

17th November, 1924. The Judgment of the Board was delivered by

Sir Lawrence Jenkins.

SIR LAWRENCE JENKINS :—This is an appeal from a decree dated the 18th July, 1921, of the Court of the Judicial Commissioner of Oudh, affirming a decree dated the 22nd March, 1921, of the Subordinate Judge of Bhairach.

The suit out of which the appeal arises was instituted on the 23rd June, 1920, by the four sons of the sixth defendant, Thakur Prithi Singh, claiming possession of the village described in the plaint. The plaintiffs and their father are a joint Hindu family governed by the law of the Mitakshara, and it is the plaintiffs' case that the village is the ancestral property of the joint family.

On the 3rd June, 1893, the plaintiffs' father purported to sell the village to Manjee Ram, who is represented in this suit by his descendants defendants Nos. 1 to 5. The seventh defendant claims as a mortgagee from defendants Nos. 1, 2 and 5.

The plaintiffs contend that the sale is not binding on them as it was not made for legal necessity, and on this ground they claim a decree for possession.

Of the many issues framed in the Court of the Subordinate Judge it is only necessary to consider whether the suit is barred by limitation, and for this purpose the dates at which the several plaintiffs were born become important.

Ranodip Singh, plaintiff No. 1, was born on the 23rd August, 1886 ; Kali Baksh Singh, plaintiff No. 2, on the 4th August, 1891 ; Sitla Baksh Singh, plaintiff No. 3, on the 1st October, 1897; and Patmeshuri Baksh Singh, plaintiff No. 4 on the 30th November, 1900. It will thus be seen that the first and second plaintiffs were in existence at the date of the sale, but the other two plaintiffs were born after its completion.

The time from which the period of limitation began to run has throughout been treated as the 3rd of June, 1893, on the assumption that the alienees then took possession of the property within the meaning of Art. 126 in the First Schedule to the Indian Limitation Act, 1908.

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The prescribed period of 12 years from this date expired in 1905, but the plaintiffs contend that limitation is saved by S. 7 of the Limitation Act, read with Ss. 6 and 8.

These sections so far as material are in these terms :—

6. (1) Where a person entitled to institute a suit.....is at the time from which the period of limitation is to be reckoned a minor . . .he may institute the suit . . . within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

7. Where one of several persons jointly entitled to institute a suit . . . is under any such disability and a discharge can be given without the concurrence of such person time will run against them all ; but where no discharge can be given time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

8. Nothing in S. 6 or in S. 7 . . . shall be deemed to extend for more than three years from the cessation of the disability . . .of the person affected thereby the period within which any suit must be instituted.

It is conceded that the suit would not be saved by these sections if brought by the first three plaintiffs alone ; but it is contended that the fourth plaintiff is entitled to the extended period for which the sections provide, and that the suit is therefore not barred by limitation. Both the Courts in India have decided adversely to this contention.

The cause of action arose on the 3rd June, 1893, and it is from that date that the period of limitation is to be reckoned. The fourth plaintiff's subsequent birth on the 30th November, 1900, did not create a fresh cause of action or a new starting point from which limitation should be reckoned.

To the contention that by the cited sections the period of limitation is extended for three years from the cessation of the fourth plaintiff's minority the answer is that by their express terms this extended period can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. The fourth plaintiff does not come within this description, for at that time he was not in existence. He, therefore, is not entitled to the three years extension, and his suit is consequently barred.

Their Lordships will accordingly humbly advise His Majesty that this appeal ought to be dismissed.

Solicitor for appellants : *H. S. L. Polak.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Brahma Subbayya ... *Petitioner** (*1st respondent and 1st defendant*)

v.

Kanala Ranga Rao ... *Respondent* (*Petitioner and 1st plaintiff*).

Subbayya *v.* Ranga Rao.

Civil Procedure Code, O. 41, R. 27 and O. 47—Scope of—If mutually exclusive—Application to let in additional evidence—If can be disposed of prior to hearing of appeal—Opportunity to rebut evidence.

The rule relating to the admission of additional evidence in appeal and the provisions in the Civil Procedure Code relating to review are not mutually exclusive. Without resorting to an application for review in the trial Court, an appellant can apply for additional evidence being let in under O. 41, R. 27. *Indrajit Pratip Sahi* v. *Amar Singh*, I L R 2 Pat 676 (P C) followed; *Keswaji Issur* v. *Great Indian Peninsular Railway Co., Ltd.*, I L R 31 Bom 381 (P C) explained. The appellate Court can make an order upon such an application even before the hearing of the appeal, but if it decides to call for additional evidence *suo motu* it does so as a rule only at the stage of final hearing of the appeal. If the admission of such additional evidence prejudices the opposite party, the Court can, on a proper case being made out, afford him necessary facilities to rebut the same.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Kurnool in C. M. P. No. 148 of 1923 in A. S. No. 48 of 1922 (O. S. No. 42 of 1920, Sub-Court, Kurnool).

V. C. Seshachariar for petitioner.

B. Somayya for respondent.

The Court delivered the following

JUDGMENT :—The District Judge of Kurnool has made an order, admitting at the instance of the 1st plaintiff, additional evidence while hearing an appeal and the 1st defendant attacks the correctness of this order, in the Civil Revision Petition before me. The point in controversy is :—Had the District Judge jurisdiction to make the order in question ? O. 41, R. 27, Civil Procedure Code, deals with the production of additional evidence in an Appellate Court. The material portion runs thus :—

"27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court.

*C R P No. 136 of 1924. *13th August, 1924.*

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"(*b*) But if the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate Court may allow such evidence or document to be produced or witness to be examined."

The argument of Mr. Seshachari, the learned vakil for the 1st defendant, is, that under this provision of law, a suitor cannot apply for admission of additional evidence, but that its provisions can be invoked, only when the Appellate Court itself discovers some inherent lacuna or defect and requires evidence to fill up the gap or remedy the defect. In other words, that the Appellate Court can act under this section of its own motion and not at the instance of the parties and reliance is placed upon the decision of the Judicial Committee in *Kesswaji Issur* v. *Great Indian Peninsular Railway Co., Ltd.* (1). It is no doubt true that some passages in the judgment in this case lend apparent support to this argument ; the observation that is most relied upon, being the following :—

"This is important, because the legitimate occasion for S. 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in S. 623."

S. 623, referred to above, is the section relating to review of judgments and orders. I understand the argument to be that a party wishing to give additional evidence must be able to bring himself, within the provisions relating to review and that his proper procedure is to apply to the Trial Court for review and not to apply for admission of additional evidence to the Court which hears an appeal from the decision. According to this contention, the two sets of rules, one relating to review and the other relating to admission of additional evidence in appeal, are mutually exclusive. If the party wishes to have additional evidence taken, he must take advantage of the review provisions ; but the Court acting *ex mero motu* and not at the instance of the parties can supply deficiencies, by taking evidence under O. 41, R. 27.

I do not think that this position is tenable, in the face of the most recent pronouncement of the Judicial Committee in *Indrajit Pratip Sahi* v. *Amar Singh* (2). An argument similar to the one now advanced was urged before the Board and after

1. (1907) I L R 31 B 381 : 17 M L J 347 (P C).
2. ((1923) I L R 2 Pat 676 : 45 M L J 578 (P C).

a very full consideration, their Lordships refused to give effect to the contention. The case in *Kesswaji Issur* v. *Great Indian Peninsular Co., Ltd.* (1) was relied on before the Board, as it has been before me, and indeed the High Court of Patna decided, on the authority of that ruling, that it had no jurisdiction to receive additional evidence in appeal, on the application of the parties. The Board, in reversing the decision of the High Court pointed out that the earlier case was peculiar in its character and after analysing the facts and circumstances of that decision clearly laid down the rule that an Appellate Court has power to receive additional evidence in appeal at the instance of parties. The law has been stated in such unmistakeable terms that the matter now admits of no doubt and I am quite clear that the contention of the petitioner must fail.

A second argument has been advanced, namely, that an order for admission of additional evidence cannot be made upon a special or preliminary application, but that the proper occasion for it is when the appeal is heard, and the evidence is examined by the Appellate Court. In this case, I am satisfied that the District Judge has made the order in question, in the course of the hearing of the appeal and has not dealt with the application as independent of and detached from the appeal. On this short ground, this argument fails ; but I am prepared to hold that there is no warrant for the position that when the application is by the party to receive additional evidence, the Appellate Court cannot make an order upon the application without hearing the appeal. Here again, the case relied on by the petitioner is *Kesswaji Issur* v. *Great Indian Peninsular Railway Co., Ltd.* (1). But it will be seen from the observations of the Lords of the Judicial Committee that the limitation referred to above applies only to cases, where the Court of its own motion makes an order for admission of additional evidence. The reason is obvious. The Court cannot make up its mind to receive additional evidence acting *ex mero motu,* without going into the evidence and becoming satisfied that there is a lacuna or defect. It is a power to be exercised by the Court on its own initiative and that function can be performed only when the Court being appraised of all the facts appearing on the record sees reason to think that there is a gap to be filled up or a defect to be re-

1. (1907) I L R 31 B 381 : 17 M L J 347 (P C).

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medied. If a party makes the application, entirely different considerations apply ; and I do not see why the application should not be dealt with, independent of the appeal, although in most cases, it would no doubt be desirable to hear the application and the appeal together even then if possible. Even then, it may not become necessary to hear the appeal fully and the Judge may make up his mind to allow or reject the application very early during the hearing of the appeal.

It is then said that the District Judge finds that the plaintiff was negligent and that therefore he ought not to have allowed the application. The rule vests the discretion in the Appellate Judge and I am not satisfied that, in this case, the discretion has not been judicially exercised. In complying with sub-rule 2 of R. 27, the learned Judge states his reasons very fully for the step he has taken. A case has not been made out for the exercise by the High Court of its revisional jurisdiction and I am therefore not prepared to interfere with the order of the learned Judge.

There only remains one other matter to be dealt with. D. W. 1 did not offer himself as a witness in the Trial Court. A statement made by him previous to the suit is now allowed to be admitted as additional evidence. The plaintiffs wish to rely upon it as an admission. The defendant may justly complain that he must be allowed not only to explain his statement, but also to adduce additional evidence, on account of the turn the events have taken. Similarly, D. W.'s 6 and 7 were not examined in regard to the relationship at all before the Trial Court. It is now proposed to cross-examine them with reference to some previous statements made by them on this subject and the District Judge has given permission. This may also render necessary additional evidence being given on the part of the defendant. Very great indulgence has been shown to the plaintiff with the result that in some respects a fresh trial of the issue may be demanded and rightly by the petitioner. These are matters, which I must leave to the Appellate Court and I have no doubt that on a proper case being made out the petitioner will be given necessary facilities.

It has been said that the District Judge in his order has shown that he has pre-judged the matter and all but given a finding in favour of the plaintiff on the question of the pedigree. But it is not however necessary to order a transfer of the ap-

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peal, as in the usual course, I am assured that the appeal will be heard by a different Judge and not by the Judge who has made the order in question.

As the District Judge points out in his order, the plaintiff has been guilty of considerable negligence.

While dismissing the Civil Revision Petition, I direct that he do pay to the 1st defendant the costs of the Civil Revision Petition, as well as all the costs occasioned in the Lower Court, by the taking of the additional evidence in any event and irrespective of the result of the appeal.

T. S. V. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice*, MR. JUSTICE DEVADOSS AND MR. JUSTICE SRINIVASA AIYANGAR.

G. Krishnaswami Aiyar, High Court Vakil and another ... *Appellants**

v.

T. V. Swaminatha Aiyar ... *Respondent.*

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Krishnaswami Aiyar v. Swaminatha Aiyar.

Legal Practitioner—Vakil—Audience in Insolvency Court at Presidency Town—Right of—Indian Insolvency Act, S. 3—High Courts Act—Letters Patent—Legal Practitioners Act, S. 4—Presidency Towns Insolvency Act, 1909, S. 121—Effect—Insolvency Court if subordinate to High Court.

Vakils have no right of audience in the Insolvency Court at the Presidency Town of Madras.

The effect of S. 121 of the Presidency Towns Insolvency Act of 1909 is that, if Vakils had the right of audience in the Insolvency Courts before 1909, it was not taken away from them ; but, if they had not such a right previously, it was not conferred on them.

The Vakils had no right of audience in the Insolvency Court prior to 1909. They had not such a right either under S. 3 of the Indian Insolvency Act, 11 and 12 Vict., Ch. 21, or under the High Courts Act or the Letters Patent.

The expression "Advocate" in S. 3 of the Indian Insolvency Act does not include Vakils.

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*O S A No. 6 of 1924. 26th August, 1924.

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S. 4 of the Legal Practitioners Act was not intended to override the special provisions relating to insolvency in the Presidency Towns.

Application of maxim *Generalia specialibus non derogant.*

Per Officiating Chief Justice and Devadoss, J. (*Srinivasa Aiyangar, J. contra*) :—The Insolvency Court is not subordinate to the High Court within S. 4 of the Legal Practitioners Act.

On Appeal from the judgment of the Hon'ble Mr. Justice Waller, dated 15th January, 1924, on the application of Mr. G. Krishnaswami Aiyar, a Vakil of the High Court, claiming a right of audience in the Insolvency Court on behalf of Chakrapani Achari, the detaining creditor in Insolvency Petition No. 392 of 1923.

In the matter of T. V. Swaminatha Aiyar, an insolvent.

The Court delivered the following

Spencer, Offg. C. J

JUDGMENTS :—*The Officiating Chief Justice* :—The question that comes up for our decision in appeal is whether Vakils have a right of audience in the Insolvency Court at the Presidency Town of Madras. We have heard full arguments from Mr. G. Krishnaswami Aiyar and Mr. A. Krishnaswami Aiyar on behalf of the Vakils and from Mr. Grant and Mr. Sidney Smith for the Advocates. The whole question has been dealt with in their arguments exhaustively and in every aspect.

Vakils appear and plead on the Original Side of the High Court at Madras, notwithstanding that the Charter of 1800 authorized only three classes of practitioners, namely, (1) *Bona fide* practitioners of the law in the old Court of the Recorder, which was thereby abolished ; (2) Barristers-at-Law in England or Ireland ; and (3) Attorneys or Solicitors admitted in one of the Courts at Westminster or otherwise capable of acting as well in the character of Advocates as of Attorneys, and that the Charter went on to " declare that *no other person or persons whatsoever* shall be allowed to appear and plead, or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them;" notwithstanding also that, in 1879, the Legal Practitioners Act provided in S. 4 that no vakil should be allowed to practise under that section before any Judge of the High Court exercising original jurisdiction in a Presidency Town.

To this day, in the High Courts of Calcutta and Bombay, vakils have no right to practise on the Original Side. How vakils obtained a footing on the Original Side of the Madras

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High Court is a matter of history, which is set out in *In the matter of the petition of the Attorneys* (1) and *Namberumal Chetty* v. *Narasimhachari* (2).

I do not propose to deal in detail with the history of the Original Side. It is sufficient to state that clauses 7, 8, and 9 of the Letters Patent of 1862 empowered the High Court to enrol so many Advocates to appear and plead, so many vakils to appear, plead and act, and so many Attorneys to appear and act, as the Court deemed fit, while clause 9 of the amended Letters Patent of 1865 empowered the High Court to enrol such and so many Advocates, Vakils and Attorneys as the Court deemed fit, and described the functions of each class of practitioners collectively without the use of the word " respectively " ; that, in the rules made on August 28, 1863, under the first Letters Patent, Rule 8 runs thus : " Vakils shall not appear, plead and act for any suitor in this Court in any matter of ordinary original jurisdiction, civil or criminal, or in any matter of appeal from any case of ordinary civil jurisdiction or upon review of any criminal case under clause 25 of the Letters Patent," but Rr. 1, 2, and 3 made on the 1st of October, 1863 recognised the right of vakils to practise on the Original Side ; and that Rr. 4 and 5 made on July 5, 1866, under the amended Letters Patent of 1865 permitted vakils admitted under the Rules of October, 1863 to appear, plead and act for the suitors in all matters over which the Court had any jurisdiction. In *In the matter of the petition of the Attorneys* (1) it was held in 1875 by a Full Bench that these rules were within the powers of the High Court . and when the matter came up again in 1916 Coutts Trotter, J., in *Namberumal Chetty* v. *Narasimhachari* (2) felt bound to follow the earlier decision. R. 533 of the Original Side Rules declares that " a vakil may appear, plead and act upon all proceedings, whether in Court or in Chambers." There is no mention of the Insolvency Court in any of these rules.

In fact historically there is no reason to treat the Insolvency Court as a part or branch of the Original Side.

In 1828 Courts were established for the relief of insolvent debtors in the East Indies by the Statute 9, Geo. IV, Ch. 73. The Insolvency Court was from those early days a separate Court, and the Indian Insolvency Act 11 and 12 of Vic., Ch. 21, enacted in 1848 by S. 3 that a Court for the relief

1. (1875) I L R M 24. 2. (1916) 31 M L J 698.

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of insolvent debtors should be held once a month in Calcutta and so often as might be necessary within the towns of Madras and Bombay and be presided over by a Judge of the Supreme Court,and it declared that every Advocate and Attorney of the Supreme Courts at Calcutta, Madras and Bombay should be entitled to practise in the way of his profession in the said Courts and that *no other persons* should practise as Advocates or Attorneys in the said Courts. This section remained in force until it was repealed in 1909 upon the passing of the Presidency Towns Insolvency Act, III of 1909. When High Courts were established at Calcutta, Madras and Bombay in 1861, the Indian High Courts Act, 24 and 25 Vict., Ch. 104, made the provisions of the Indian Insolvency Act which referred to the Supreme Courts of Bengal, Madras and Bombay and to the Judges of those Courts, applicable under S. 11 to the High Courts of those places so far as the provisions were consistent with that Act and with the Letters Patent.

Section 121 of the Presidency Towns Insolvency Act states :—" Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the relief of insolvent debtors. " The effect of this section is that, if Vakils had the right of audience in the Insolvency Courts before 1909, it was not taken away from them ; but, if they had not such a right previously, it was not conferred on them.

No rules have been framed either before or since the passing of that Act permitting Vakils to appear in insolvency proceedings before a Judge of the High Court. The rules made on 22nd December, 1848, for regulating the proceedings in the Court for the relief of insolvent debtors speak only of the Attorney of every prisoner representing him in the said Court. The Insolvency Rules of 1910 in Order 15 speak only of Attorneys and Advocates representing insolvents in the Insolvency Court. Section 9 of the Indian High Courts Act of 1861 confers on the High Court jurisdiction in all civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial matters, but is silent on the subject of insolvency. Cl. 18 of the Letters Patent of 1865 refers to the Court for the relief of insolvent debtors as a Court

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governed by its own laws and held before one of the Judges of the High Court. In paragraph 13 of the Secretary of State's letter, dated 14th May, 1862, that accompanied the Letters Patent, the omission to reserve the right of pleading in the Insolvent Court after the issue of the Charter to Attorneys of the Supreme Court is explained as due to the fact that the Insolvent Court was a separate tribunal, not affected by the Act authorizing the Letters Patent. In conclusion, it is stated (the Insolvent Court) " will continue a separate Court, though for the future presided over by a Judge of the High Court. The Attorneys, therefore, will, as heretofore, practise in accordance with the rules of the Insolvent Court itself."

Although the Court for the relief of insolvent debtors was always treated as a *separate Court* presided over by one of the Judges of the Supreme Court or High Court, as the case might be, the fact that appeals lie from the decision of the presiding Judge to the High Court, and the fact that S. 15 of the High Courts Act invests the High Court with the power of superintendence over all Courts which are subject to its appellate jurisdiction do not necessarily make it a *subordinate* Court any more than the Original Side Court or an Admission Court, from which appeals lie under the Letters Patent against the decision of a single Judge, can be described as subordinate to the rest of the High Court. R. 13 of the Appellate Side Rules, Chapter III, which states that Advocates, Vakils, and Attorneys of the High Court are entitled to practise in any of the Courts subordinate to the High Court has therefore no application.

For the Vakils, reliance was placed on S. 4 of the Legal Practitioners Act. This declares that any person entered as on Advocate or Vakil on the roll of any High Court who ordinarily practises in that Court or in some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in British India other than a High Court on whose roll he is not entered, or, with the permission of the Court, in any High Court on whose roll he is not entered. Although this Act was passed in 1879, it did not purport to expressly repeal S. 3 of the Indian Insolvency Act. No doubt, under clause 44 of the Letters Patent of 1865, the provisions of the Letters Patent were made subject to the law-making powers of the Governor-General in Council, but, I should hesitate to imply that an

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earlier Act is repealed by implication by a later Act without more express words to that effect. In Volume XXVII, Halsbury's *Laws of England*, page 197, we find the principles laid down, that a statute may be repealed by implication (1) if its provisions are wholly incompatible with the subsequent statute, or (2) if the two, standing together, will lead to wholly absurd consequences, or (3) if the entire subject-matter of the first is taken away by the second. Now, S. 4 of the Legal Practitioners Act is not wholly incompatible with the provisions of the Indian Insolvency Act or of the Presidency Towns Insolvency Act. It merely provides that a person entered on the rolls of a High Court, who ordinarily practises in that Court or in some Court subordinate to it, may practise, as such, in any High Court where he is not enrolled if he gets the permission of that Court, or without such permission he may practise in any other Court in British India but a High Court.

The words "as such" denote that his claim to practise must be in his capacity as an enrolled Vakil ordinarily practising in the Court where he is enrolled. As there are no rules made by the Madras Court for the practice of Vakils in the Insolvency Court, such practice is not a feature of their ordinary practice, and therefore, they cannot claim a right to practise, *as such* in any other Court. For instance, a Madras High Court Vakil could not legitimately claim to be heard in the Insolvency Court of Bombay, because he does not ordinarily practise in the Insolvency Court of Madras, nor could a Vakil demand to be allowed to practise as an Advocate in a Court on whose rolls he is not entered. By this section Advocates and Vakils who wish to practise outside the High Court in which they are enrolled are placed on the same footing as regards obtaining permission of the High Court where they wish to practise when they are not on the roll of that Court.

On the principle of *Generalia specialibus non derogant* I think that S. 4 of the Legal Practitioners Act was not intended to override the special provisions relating to insolvency in the Presidency Towns.

Mr. G. Krishnaswami Aiyar at one time suggested that the word "Advocate" in the Indian Insolvency Act might be understood in its wider significance of one who pleads the cause of another ; but it is clear from the Charter Act that it was meant to include only those Barristers who had been en-

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rolled as Advocates in the Courts at Calcutta, Madras and Bombay, respectively, and those who had been practitioners in the Recorder's Court, if any such were still alive in 1848.

I have come to the conclusion that the order of Waller, J., refusing to allow Vakils to appear and plead in the Insolvency Court is correct. The appeal will be dismissed but without costs.

Devadoss, J.

Devadoss, J.—This is an appeal from the order of Waller, J., upholding the action of the Deputy Registrar, Original Side, who returned a Vakalat filed in I. P. No. 392 of 1923 by Mr. G. Krishnaswami Aiyar on the ground that a Vakil had no right of audience in the Insolvency Court. Mr. G. Krishnaswami Aiyar has preferred this appeal and the Vakils' Association, Madras, supports it. The Bar Association and the Attorneys' Association, Madras, oppose the appeal. The appellant's contention is that a Vakil has a right of audience in the Insolvency Court. The arguments advanced on behalf of the appellant may be summarised under the following heads :—

(1) The Vakils had a right of audience in the Supreme Court, Madras, and are, therefore, included in the class of practitioners mentioned in S. 3 of 11 and 12 Vict., Ch. 21.

(2) Even if they had not the right of audience in the Supreme Court, after the establishment of the High Court they were given by the High Courts Act and the Letters Patent the right of audience on the Original Side, and S. 3 of 11 and 12 Vict., Ch. 21, should be read as applying to all the practitioners of the High Court.

(3) The class of practitioners mentioned in S. 3 of 11 and 12 Vict., Ch. 21, having become extinct, the term "Advocate" used in S. 3 of the Act should be held to apply to Vakils who exercise the profession of advocates.

(4) The Insolvency Court being a Court subordinate to the High Court, a Vakil had a right of audience in that Court under S. 4 of the Legal Practitioners Act. Even if it was not a subordinate Court, the Court for the relief of insolvent debtors having been a Court in British India, the Vakil had a right of audience in that Court.

(5) The Court for the relief of insolvent debtors having been abolished and the insolvency jurisdiction having been vested in the High Court by the passing of the Presidency Towns Insolvency Act, a Vakil of the High Court has the

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right of audience when the High Court exercises insolvency jurisdiction.

(6) Granting that the High Court has power to frame rules prohibiting Vakils from appearing in insolvency cases, no such rule having been framed, a Vakil's right of audience on all sides of the High Court subsists.

The question involved in this appeal is the right of audience of a Vakil before a Judge exercising original insolvency jurisdiction and before the Deputy Registrar, Original Side, who is empowered under the rules to hear and determine certain matters. The question whether a Vakil is entitled to appear in appeals from orders and judgments of the Judge exercising original insolvency jurisdiction was settled so far back as 1888 in favour of the Vakils. In O. S. Appeal No. 10 of 1888 a Bench of the High Court held that a Vakil was entitled to appear in an appeal from an order of the Insolvency Commissioner. In this appeal we are therefore concerned with the right of the Vakil to appear in what I may call, for brevity's sake, original insolvency cases.

In order to determine whether a Vakil had the right of audience in the Supreme Court, it is necessary to see what class of practitioners were allowed to practise before the Supreme Court. A Mayor's Court was established in Madras in 1753. It was superseded by the establishment of the Recorder's Court in 1798. The Supreme Court of Madras was established by a Royal Charter in 1800 by virtue of the Government of India Act of 1800. The Letters Patent of that year contained the following provision as regards the practitioners of that Court: They "authorized and empowered the Supreme Court of Judicature to approve, admit and enrol such and so many persons being *bona fide* practitioners of the Law in the said Court of the Recorder at Madras at the time of the publication of this our Charter at Madras or having been admitted Barrister-at-Law in England or Ireland or having been admitted Attorneys or Solicitors in one of our Courts at Westminster or being otherwise capable according to such rules and qualifications as the said Court shall for that purpose make and declare, to act as well in the Character of Advocates as of Attorneys in the said Court. And we do declare that no other person or persons whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of

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them." The persons permitted to practise before the Supreme Court under the Letters Patent were :

(1) Persons being *bona fide* practitioners of the Law in the Court of the Recorder at Madras ;

(2) Barristers-at-Law in England or Ireland ;

(3) Attorneys or Solicitors in one of the Courts at Westminster ;

(4) Being otherwise capable according to such rules and qualifications as the said Court shall for that purpose make and declare to act as well in the Character of Advocates as of Attorneys in the said Court.

It is contended that the 4th class contemplated in the Letters Patent were Vakils. What the clause means is, persons otherwise capable according to such qualifications as the Court shall for the purpose make and declare, may be admitted to practise as Advocates or Attorneys. It was never intended by that clause that there was to be a class of practitioners who had the right to appear, plead and act. Such a practitioner was unknown to the Courts in England and to the Mayor's Court as well as the Recorder's Court at Madras. The Supreme Court was established on the model of the King's Bench Court as is clear from the High Courts Act of 1800, 39 and 40 Geo. III, Ch. 79. The Letters Patent establishing the Supreme Court of Judicature at Madras, dated 26th December, 1800, states the Court was to have " such jurisdiction and authority as our justices of our King's Bench Court have and may lawfully exercise within that part of Great Britain called England as far as circumstances may permit." The King's Bench Court knew of no class of practitioners who could appear, plead and act. An Attorney appears and acts, and an Advocate appears and pleads and their privileges and functions as well as their disabilities are well defined. It would be doing violence to language to construe the words of the Letters Patent as introducing a class of practitioners unknown to the framers of the Act. That the Supreme Court recognised no class of practitioners as Vakils is clear from the rules of the Supreme Court now available. Under the rules in force so late as 1849, only Attorneys, Solicitors and Proctors were recognized as the persons who could act in that Court. There is no evidence that a Vakil was ever allowed to practise before the Supreme Court. This circumstance may be taken to be some indication of what was meant by the Letters Patent and what the Judges and Practitioners understood them to

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mean. The Letters Patent empowered the Supreme Court to enrol persons properly qualified according to its rules as Advocates or Attorneys and did not empower it to enrol persons who as practitioners had the right to appear, plead and act. The clause " we do declare that no other person or persons whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them " is very emphatic. The Letters Patent did not give a wide discretion to the Supreme Court but empowered it to enrol duly qualified persons as Advocates or Attorneys whose functions, privileges and disabilities were well known to the framers of the Supreme Courts Act of 1800. That their Lordships of the Privy Council attach great importance to the negative clause of the Letters Patent in construing the whole clause is clear from the case reported in *Morgan* v. *Leech* (3). In the light of this decision it cannot be reasonably contended that the 4th class contemplated by the Letters Patent were the Vakils.

Second point.—Before the Crown took over the Government of India, the Supreme Court or the King's Court exercised jurisdiction within the limits of the Madras city, and the East India Company's Courts called Sudder Adalat and Fouzdari Adalat exercised appellate jurisdiction, civil and criminal, over the territories of the East India Company in the Presidency of Madras. After the Crown took over the Government of India, the Courts continued to exercise their several functions till the passing of the Indian High Courts Act of 1861, 24 and 25 Vict., Ch. 104. It empowered the Crown to establish High Courts of Judicature in Bengal, Madras and Bombay. By S. 8 of the Act the Supreme Court of Madras and the Sudder Adalat and Fouzdari Adalat of this Presidency were abolished upon the establishment of the High Court. Clause 7 of the Letters Patent of 1861 authorized and empowered the High Court to approve, admit and enrol such and so many Advocates as to the said High Court should seem meet. Clause 8 authorized and empowered the High Court to approve, admit and enrol such and so many Vakils as the High Court should deem fit. Clause 9 relates to Attorneys. Clause 10 empowered the High Court to make rules for the qualification and admission of Advocates, Vakils and Attorneys. The

3. (1841) 2 M I A 428.

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High Court was given Civil and Criminal Appellate Jurisdiction and Extraordinary Original Jurisdiction over the Presidency, and Ordinary Original Civil and Criminal jurisdiction within such local limits as may be declared by law or regulation of the Governor in Council. R. 7 of the High Court Rules, dated 28th August, 1862, allowed Vakils to appear, plead and act in all matters of Appellate Jurisdiction, Civil or Criminal, and in matters of Extraordinary Original Civil Jurisdiction under S. 13 of the Letters Patent. It is clear from the rules, that Vakils had no right of audience on the Original Side of the High Court whether it exercised Civil or Criminal Jurisdiction and also in appeals from orders, judgments and decrees passed in the exercise of Original Jurisdiction. For the first time in 1863 it appears from the rules of the High Court, dated 1st October, 1863, that some Vakils were permitted to practise on the Original Side. A few Vakils were enrolled as Vakils on the Original Side and a separate roll was maintained for that purpose. R. 2 relating to remuneration and practice of the Vakils on the Original Side of the High Court was framed on the 1st October 1863. In 1865 Amended Letters Patent were issued. Clause 9 of the Letters Patent empowered the High Court to enrol Advocates, Vakils and Attorneys. Fresh rules and orders relating to Advocates, Vakils and Attorneys and the taxation for allowance of costs were framed by the High Court and were published on 5th July, 1866. The rules of 1863 were to be read as part of the rules so far as the qualification and admission of Advocates, Vakils and Attorneys were concerned. The rules recognized a Vakil as a practitioner on the Original Side. In 1874 the Attorneys objected to Vakils practising on the Original Side on the ground that the rules permitting them to practise were *ultra vires*. But a Full Bench of the High Court held that the rules were *intra vires*. Vide *In the matter of the Petition of the Attorneys* (1). It is neither desirable nor expedient to question the correctness of the decision. It was not challenged till quite recently and vested interests have been created, and on the principle that what has been once settled should not be lightly upset it is not proper to question the soundness of the decision.

The right to appear on the Original Side did not *ipso facto* give the Vakil a right to appear in the Court for the relief of insolvent debtors. The Letters Patent did not give insol-

1. (1875) I L R 1 M 24.

vency jurisdiction to the High Court. The Court for the relief of insolvent debtors was first established by an Act of Parliament, George 9 IV, Ch. 73, and the Act was extended from time to time. In 1848, 11 and 12 Vict., Ch. 21 was passed wherein it was enacted that "the Court for the relief of insolvent debtors was to be holden by any Judge of the Supreme Court of Judicature in Calcutta and within the towns of Madras and Bombay and 'every Advocate' and Attorney of the said Supreme Courts at Calcutta, Madras and Bombay respectively shall be entitled to practise in the way of his profession in the Court for the relief of insolvent debtors of that Presidency and no other persons shall practise as Advocates or Attorneys in the said Court for the relief of insolvent debtors." This section did not allow Vakils to practise before the Court for the relief of insolvent debtors.

Third point.—It is next argued that the class of practitioners mentioned in S. 3 of 11 and 12 Vict., Ch. 21, ceased to exist when the Supreme Court was abolished and there could not have been Advocates and Attorneys of the Supreme Court when there was no such Court and therefore the word "Advocate" could only apply to one who exercised the profession of an Advocate, and a Vakil being one who exercised the profession of an Advocate became entitled to appear before the Court for the relief of insolvent debtors. S. 3 of 11 and 12 Vict., Ch. 21 recognised only Advocates and Attorneys. When the Supreme Court ceased to exist the Advocates and Attorneys of that Court became Advocates and Attorneys of the High Court in its Original Civil and Criminal Jurisdiction, and special provision was made by R. 4 of the Rules, dated 28th August, 1862, for their being enrolled as Vakils on the Appellate Side of the High Court. The rules of 1862 did make a marked distinction between the Original and the Appellate Sides of the High Court. The Advocates and Attorneys of the Supreme Court became Advocates and Attorneys of the High Court. Their qualifications, rights and privileges as well as their disabilities remained the same. Though the Supreme Court was abolished, all its functions, powers and privileges were transferred to the High Court by S. 10 of the High Courts Act of 1861. This section was repealed by 28 and 29 Vict., Ch. 15, S. 2. Section 11 of the High Courts Act of 1861 made applicable to the High Court and the Judges thereof all the provisions then in force, of Acts of Parliament, or of any orders of Her Majesty in Council, or of any Acts

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of the Legislature of India, etc. What was applicable to the Supreme Court by virtue of S. 3 and other provisions of 11 and 12 Vict., Ch. 21, became applicable to the High Court and the Judges thereof. Clause 18 of the Letters Patent makes it clear that the law and practice of the Court for the relief of insolvent debtors was not to be changed by the abolition of the Supreme Court and by the establishment of the High Court but was to be continued as it was before 1861. Clause 18 is in these terms :—" And we do further ordain that the Court for the relief of insolvent debtors at Madras shall be held before one of the Judges of the said High Court of Judicature at Madras, and the said High Court and any such Judge thereof shall have and exercise, within the Presidency of Madras, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India." The portion of the clause " such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India " leaves no room for doubt that the old order of things was to continue. The Chief Justice of the High Court deputed one of the Judges to preside over the Court for the relief of insolvent debtors, and he was known as the Commissioner in Insolvency. That Court was governed by the laws relating to the insolvent debtors in India. With regard to the practitioners, S. 3 of 11 and 12 Vict., Ch. 21, was in force. Before 1861 only Advocates and Attorneys practised before the Court for the relief of insolvent debtors, and after 1861 the same practitioners continued to practise and S. 3 did not permit any other person to practise before it.

The contention that Advocates and Attorneys ceased to exist when the Supreme Court was abolished and therefore the Advocates and Attorneys of the High Court had no right of audience in the Court for the relief of insolvent debtors is not worth serious consideration in the light of cl. 18.

The extreme contention that a Vakil is an Advocate and therefore he is entitled to practise in the Insolvency Court overlooks plain facts. Advocates are a distinct class with qualifications, rights and privileges and disabilities of their own. They are enrolled as a distinct class as Advocates, whereas Vakils do not possess the same qualifications and are not subject to the same disabilities. A Vakil therefore cannot come within the term " Advocate " as used in the High

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Courts Act, in the Letters Patent and in S. 3 of 11 and 12 Vict.. Ch. 21. It is unnecessary to consider this contention further.

The Court for the relief of insolvent debtors was not a part of the High Court but a distinct Court and any practitioner of the High Court was not as such entitled to a right of audience unless he fulfilled the conditions laid down in S. 3 of 11 and 12 Vict., Ch. 21.

Fourth point.—"The Court for the relief of insolvent debtors was a Court subordinate to the High Court and under S. 4 of the Legal Practitioners Act a Vakil was entitled to appear in that Court."

It is argued that the Court for the relief of insolvent debtors was a Court subordinate to the High Court because the High Court was empowered to make rules for that Court and was authorized to call for reports and hear appeals from it. There is no warrant for saying that the Court for the relief of insolvent debtors was a Court subordinate to the High Court. The Original Side of the High Court is presided over by one or more Judges of the High Court. It can by no means be said to be a Court subordinate to the High Court. The High Court frames rules for the conduct of business on the Original Side and hears appeals from the orders and decrees passed on that side. The Original Side of the High Court is a part of it and not a Subordinate Court. The Court for the relief of insolvent debtors was a distinct and separate Court established by an Act of Parliament and was presided over by one of the Judges of the Supreme Court, Madras, and after the High Court was established, by one of the Judges of the High Court; and appeals from orders and judgments in insolvency cases lay to the Supreme Court during its existence and thereafter to the High Court. This circumstance did not make the Court for the relief of insolvent debtors a Court subordinate to the High Court within the meaning of S. 4 of the Legal Practitioners Act.

It is next urged that even if the Court for the relief of insolvent debtors was not a Court subordinate to the High Court S. 4 of the Legal Practitioners Act authorized a Vakil to practise in all the Courts in British India except a High Court on the roll of which he was not entered, and the Court for the relief of insolvent debtors being a Court in British India a Vakil was entitled to practise before it. If this contention is to be upheld an Attorney on the roll of the Madras

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High Court would be entitled to practise in the Court for the relief of insolvent debtors in Bombay or Calcutta.

Great reliance is placed upon the words " and all " used in S. 4. The same words are used in S. 5 which relates to Attorneys. From the use of these two words it cannot be said that the Legislature intended to repeal S. 3 of 11 and 12 Vict., Ch. 21. When the High Courts of Bengal, Bombay and Madras had not insolvency jurisdiction *qua* High Courts, it would be imputing absurdity to the Indian legislature to say that it intended that a Vakil on the roll of the High Court should have the right to practise before the Court for the relief of insolvent debtors established by a special Act of Parliament wherein it was enacted what class of practitioners should practise before it. It is strongly urged on behalf of the appellant that S. 3 has been impliedly repealed by the enactment of S. 4 of the Legal Practitioners Act. The principle upon which the Courts should interpret a later Act as repealing a former enactment by implication has been laid down by eminent Judges, and the tests which they lay down do not apply to the present case. In *Dobbs* v. *Grand Junction Waterworks Company* (4), Field, J., in delivering the judgment of the Court observes as follows :—" Repeal by implication is never to be favoured. It is no doubt the necessary consequence of inconsistent legislation whenever it occurs but which must not be imputed to the legislature unless absolutely necessary." In *Seward* v. *Vera Cruz* (5), Earl of Selborne, L. C., lays down the principle in the following terms at page 68 : " Now if anything be certain it is this ; that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. For that principle I may refer to *Hawkins* v. *Gathercole* (6). " A. L. Smith, J., states the principles upon which the Court should be guided in construing whether a later enactment repeals a former one by implication in *Kutner* v. *Phillips* (7) : " Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an

4. (1883) 9 Q B D 151. 5. (1885) 10 App Cases 59.
6. (1855) 24 L J Ch 332 : 6 De G M & G 1. 7. (1891) 2 Q B D 267 at 271.

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earlier one that the two cannot stand together, in which case the maxim *Leges posteriores contrarias abrogant* applies. Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts, unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together : *Thorpe* v. *Adams* (8). Lord Coke in *Gregory's case* (9) lays it down that a later statute in the affirmative shall not take away a former Act, and *eo potiore* if the former be particular and the latter be general ; and Lord Hardwicke in the case of *Middleton* v. *Crofts* (10) is to the same effect." Lord Blackburn explains the principles in his own inimitable way in *Garnett* v. *Bradley* (11) : " I think that where only general words are used there is a strong presumption that the Legislature did not intend to take away a particular privilege, right, or property, of a particular class, unless they have done something to show that. If they have done something in such a way as would show that that was their intention, if they have said in negative words that those rights or privileges shall all be taken away, any enactment to the contrary notwithstanding, that would prevent the presumption arising at all. But in the absence of that, I think it is an intelligible principle to say that the Legislature shall not be presumed to have done anything unfair, and to have taken away this particular privilege, not having stated openly that they meant to take it away, or in such open or clear language that the persons affected might come and resist and use arguments to show why it should not be taken away, but having simply used general words quite consistent with their never having thought of this privilege at all. I think, my Lords, that that principle will reconcile almost all the cases. Certainly it will reconcile all I have cited, and it is a good and intelligible principle. " *See* Browne's *Legal Maxims*, 7th Edition, page 19.

11 and 12 Vict., Ch. 21, was a special enactment. The Legal Practitioners Act is a general Act made applicable to the whole of India. It cannot be said that in passing a general Act like the Legal Practitioners Act, the rights and privileges enjoyed by a particular class of persons under a special enactment which established a particular Court were taken away and

8. (1871) L R 6 C P 125. 9. 6 Rep 19(*b*).
10. (1736) 2 Atk 675. 11. (1878) 3 App Cases 944 at 969.

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that the Legislature intended to alter the existing state of things and intended to repeal S. 3 of 11 and 12 Vict., Ch. 21. The intention of the Legislature not to alter vested rights or existing state of things is clear from the proviso to S. 4 itself. That proviso is in these terms: "Provided that no such Vakil or Pleader shall be entitled to practise under this section before a Judge of the High Court, Divisional Court or High Court exercising original jurisdiction in a Presidency Town." When the Legislature took care to perpetuate the state of things existing in 1878 in Bombay and in Calcutta in the High Court itself for the benefit of whose practitioners it was enacting S. 4, can it be said that the Legislature intended to throw open the Insolvency Court to the Vakils? I think this proviso is an answer to the contention of the appellant.

In construing S. 4 the reason for enacting it should not be overlooked. Before the Legal Practitioners Act of 1879 was passed, Advocates and Vakils of the High Court had to get permission from the presiding Judge of the District Court and other Subordinate Courts before they could appear and plead in such Courts, though in Madras the High Court by its rules of 1863 gave Advocates and Vakils the right to appear in all the Subordinate Courts. In order to remove this restriction of the right of the Advocates and Vakils to appear before the Subordinate Courts S. 4 was enacted. The Act was not primarily intended for the practitioners on the roll of the High Court but for the pleaders not on the roll of the High Court. Only Ss. 4, 5, 7, 16, 25, 27, 32 and 36 are made applicable to Advocates, Vakils and Attorneys admitted and enrolled by the High Court under the Letters Patent. This contention of repeal by implication is an untenable one.

Fifth point.—In 1909 the Presidency Towns Insolvency Act was passed repealing 11 and 12 Vict., Ch. 21. The Act gave insolvency jurisdiction to the High Courts of Judicature at Fort William, Calcutta, Bombay and Madras, and the Chief Court of Burma. The insolvency jurisdiction is now one of the several jurisdictions of the High Court. It is contended that the Vakil is entitled to appear before the High Court whatever jurisdiction it may exercise. S. 121 of the Presidency Towns Insolvency Act was specially enacted to preserve the state of things prevailing on the date of the passing of the Act with regard to the rights and privileges of the practitioners entitled to practise in the Court for the relief of

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insolvent debtors. The section did not confer any right of audience on persons who had it not before the passing of the Act. S. 121 is in these terms : "Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person might have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the relief of insolvent debtors." The section is emphatic in its terms. The Court for the relief of insolvent debtors did not allow Vakils to practise before it. By the transfer of the jurisdiction to the High Court the right of audience which did not exist before was not conferred on any class of practitioners. In order to prevent the practitioners of the High Court who had not the right to appear in the Court for the relief of insolvent debtors claiming right of audience in the new jurisdiction, S. 121 was enacted.

Before the passing of the Presidency Towns Insolvency Act the rules framed for the conduct of the business in the Court for the relief of insolvent debtors recognised only one class of practitioners, namely, Attorneys,—*see* Rr. 117 and 118 of the rules under 11 and 12 Vict., Ch. 21. After the passing of the Indian Insolvency Act fresh rules were framed by the Madras High Court. They also recognised only Attorneys,—*vide* Order 15, Rr. 121 to 131 of the rules framed under the Presidency Towns Insolvency Act. For nearly a century, only Advocates and Attorneys were recognised as practitioners in the Court for the relief of insolvent debtors. For nearly half a century after the establishment of the High Court, no Vakil claimed a right of audience in the Court for the relief of insolvent debtors. After the passing of the Act of 1909, there is nothing to show that, till this case came up, any Vakil claimed the right of audience in the Insolvency Court. On the principle that vested rights should not be lightly interfered with and that the existing state of things should be maintained S. 121 was enacted. It denies Vakils the right of audience when the High Court exercises Original Insolvency Jurisdiction. A very strong case must be made out before a long-established practice could be considered as illegal or opposed to law. In this connection I may refer to a decision of Fletcher, J., in *In re, A Vakil's Application* (12):

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12. (1910) I L R 37 C 854.

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In that case a Vakil claimed a right to file a warrant of Attorney in respect of a suit pending before the Midnapur District Court, in which a rule had been issued on behalf of the defendant calling upon the plaintiffs to show cause why the suit should not be transferred to the High Court in its extraordinary Original Civil Jurisdiction. Fletcher, J., refused to allow the Vakil to appear and made the following observations at page 854 : There has been a "long-continued practice in which Vakils have never appeared, dating from the establishment of the High Court in 1862 and continuing down to 1910 ; and one would have thought that, had the Vakils the right to appear, some exercise or claim to exercise that right would have been put forward during a period of almost half a century. I am satisfied that the claim to appear on an application for transfer has never yet been made. That being the established practice of this Court, it would be obviously improper for a single Judge sitting on the Original Side to depart from a practice regulating the various branches of the profession for such a period unless he was satisfied that the practice was wrong." The High Courts of Calcutta and Bombay have not thrown open the insolvency side of the High Court to Vakils. This may not be a satisfactory argument against the appellant's contention, but it shows that the other High Courts have taken the same view. At least it shows that the Vakils did not put forward a right to appear in insolvency cases. I am quite satisfied that S. 121 is a bar to the Vakil's claim to appear in insolvency cases.

Sixth point.—It is further urged that granting that the High Court has power to frame rules prohibiting Vakils from appearing in insolvency cases, no such rules have been framed and the Vakil's right of audience on all sides of the High Court subsists. The Act which created the Court for the relief of insolvent debtors laid down what class of practitioners were to practise before it, and unless it can be held that the law relating to insolvency jurisdiction and its practice has been changed, it would not be open to a class of practitioners who had not the right to practise in an Insolvency Court to claim that right now. There are no rules prohibiting Vakils from appearing in insolvency cases. Nor are there rules permitting them to appear in insolvency matters. The rules relating to practitioners both before and after the passing of the Indian Insolvency Act apply only to Attorneys. There are no rules providing for the remuneration of Vakils and taxation of their

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costs in insolvency matters. A safe inference can be drawn from the absence of rules as to remuneration of Vakils in insolvency matters that the High Court denied them the right of audience in insolvency cases. The long-established practice has to be taken into consideration in deciding this point. Though there are no positive rules prohibiting a Vakil from practising in the Insolvency Court, yet it must be presumed that the High Court gives effect impliedly to S. 3 of 11 and 12 Vict., Ch. 21 and S. 121 of the Presidency Towns Insolvency Act. If the Vakils have no right to appear in Presidency-town insolvency matters,the absence of a rule prohibiting them would not entitle them to appear in such cases. It was vehemently argued that the High Court could not make rules prohibiting Vakils from appearing in the Insolvency Court. The High Court has power to frame rules for regulating the conduct of Advocates, Vakils and Attorneys, and it has also power to frame rules with regard to their rights and privileges. The High Court can frame rules, if it likes that a Vakil shall not practise before the Insolvency Court. It is unnecessary to pursue this matter further as there are no rules prohibiting Vakils from appearing in insolvency matters. The absence of any rule prohibiting Vakils from appearing in insolvency matters does not give them the right to appear. On a full and anxious consideration of the question, I have no hesitation in holding that a Vakil has no right of audience in insolvency matters. The appeal fails and is dismissed.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The question raised in this appeal has been invested with almost a sensational importance by reason of a long standing and perhaps natural jealousy between two important and influential sections of the Bar in Madras. So far as I am personally concerned, the process of coming to a decision on such an important question has not been rendered easier for me by the bias in my mind imbibed albeit unconsciously during my close association with three generations of one of those sections of the Bar. I am now free to confess that during many years past the belief that the Vakils had an unquestionable right of audience in the Insolvency Court and that, therefore, their exclusion from it has been maintained only by the continued perpetration of a wrong has been one of the cardinal articles of creed in that branch of profession and the names of some of the most eminent lawyers who belonged to that branch of profession have come down associated with that faith. I have had, therefore,

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necessarily to steel myself against all such pre-conceived bias and approach the decision of the question merely as a dry question of law. After giving my earnest and anxious consideration to all the aspects of the arguments so ably placed before us by the learned gentlemen who appeared to represent the various branches of the profession, I have felt bound to come to the conclusion that under the law and the rules of Court, as they stand at present, the Vakils have no right of audience in the Insolvency Court. By the courtesy of my Lord the Chief Justice I have had the advantage of perusing his judgment. It is not, therefore, necessary for me to go over the entire ground. Mr. G. Krishnaswami Aiyar argued that even prior to the constitution of the High Court in 1861 under the Charter Act, Vakils had a right of audience in the Insolvency Court as constituted by 11 and 12 Vict., Ch. 21. I am constrained to observe that that branch of his argument was more subtle than convincing and I am not sure that he was himself inclined seriously to press it. Mr. A. Krishnaswami Aiyar, who appeared for the Madras High Court Vakils' Association, confined himself only to two arguments, both of which call for a close and critical examination. The pith of the contentions with regard to these two arguments may be summed up somewhat as follows :—When under the Charter Act the High Court was established in the year 1861 the Insolvency Court established under 11 and 12 Vict., Ch. 21 either remained and continued as a separate Court or else became merged in the High Court. If it be held that it became merged in the High Court, we shall show that as High Court Vakils enrolled as such on the rolls of the High Court we are entitled, in the absence of any express rules prohibiting the same, to an audience in the Insolvency Court and we shall also show that by express rules the right of practising in all the jurisdictions of the Court has been expressly granted to us. If, on the other hand, it should be held that even after the constitution of the High Court the Insolvency Court remained and continued a separate Court, then we say that on the passing of the Legal Practitioners Act of 1879 and under the provisions of S. 4 of that enactment we became entitled to practise before the Insolvency Court, because that Court is subordinate to the High Court and subject to its supervision or is at any rate a Court in British India not being a High Court. At first sight this dilemma seems no doubt staggering and almost unanswerable. I shall first deal with

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the first branch of this dilemma, namely, the arguments based on the theory of the merger of the Insolvency Court in the High Court. I am unable to see my way to accept any such theory of merger. The Court for the relief of insolvent debtors was the creature of a separate Parliamentary Statute, 11 and 12 Vict., Ch. 21. That statute is independent and complete in itself. The only connection which that Court had under that statute with the Supreme Court at the time was that the person to be appointed the Commissioner in Insolvency was to be one of the Judges of the Supreme Court. This and any other incidental connections with the Supreme Court cannot take away from the statutory independence as a separate Court of the Court for the relief of insolvent debtors. The Charter Act of 1860 and the Letters Patent issued thereon did no more than substitute the High Court in the place of the Supreme Court for purposes of such incidental connections. There are no apt words in any enactment by which it could be deemed that the Court for the relief of insolvent debtors either became abolished or was merged in the High Court. It is not, therefore, necessary for me to consider the arguments based on the theory of merger. I admit there would be considerable force in the arguments advanced on the basis of the theory of merger if such merger could be found : but as it could not be found that there has been any such merger, no useful purpose is likely to be served by considering those arguments.

We are then left only with the other branch of the dilemma, namely, that of the Insolvency Court having continued as a separate Court in British India until the passing of the Legal Practitioners Act and the enactment of S. 4 therein. I feel I cannot agree with the contention that as a separate Court the Insolvency Court was not a Court subordinate to the High Court. The provisions of law for the High Court making rules, appointing officers, etc., are of such a character which to my mind would make the Insolvency Court subordinate to the High Court within the meaning of any enactment and certainly within the meaning of S. 4 of the Legal Practitioners Act. It is not necessary for me to labour that point, because it is inconceivable that the Insolvency Court should not be held to be at any rate a separate Court in British India. Under S. 4 of the Legal Practitioners Act every High Court Vakil is given a right to practise in every Court in British India other than the High Court on the rolls of which he is

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not enrolled. If therefore the Insolvency Court is a separate Court in British India, it follows that High Court Vakils should, under the provisions of S. 4 of the Legal Practitioners Act, have a right of audience in it. The position then is this : Under S. 3 of 11 and 12 Vict., Ch. 21, a Parliamentary Act, only Advocates and Attorneys are allowed to practise in the Court for the relief of insolvent debtors. Then in 1879 the Government of India passed the Legal Practitioners Act under which in general terms High Court Vakils on the rolls of any of the High Courts are accorded the right of practice in all the Courts in British India except the High Court on the rolls of which they are not so enrolled. The Indian Legislature has undoubtedly the power under the Parliamentary Statutes themselves to vary, modify and rescind with certain exceptions any enactment relating to India passed by the Imperial Legislature. The question then resolves itself into this. Has the Indian Legislature by passing the Legal Practitioners Act rescinded, varied or modified, S. 3 of 11 and 12 Vict., Ch. 21 ? The question has to be solved merely as a question of interpretation of Statutes. It is clear that the Legal Practitioners Act has not purported to rescind, modify or vary S. 3 of 11 and 12 Vict., Ch. 21, or any provision therein contained. It is true that the general words of S. 4 of the Legal Practitioners Act granting a right of audience to Vakils are inconsistent with the right of exclusive audience given by S. 3 of 11 and 12 Vict., Ch. 21, to Advocates and Attorneys. In *limine* it seems to me that while the Subordinate Legislature is given power by the Supreme Legislature to rescind, modify or vary within limits any enactments of the Supreme Legislature, such power should, generally speaking, be exercised only expressly, and in the absence of any express exercise of such power it ought not to be open to construe any enactment of the Subordinate Legislature as involving necessarily an implied exercise of such power. The conflicts between the enactments of superior and inferior legislatures should not be dealt with or considered in the same manner as if such conflicts arose between two enactments one earlier and the other later of the same legislature. On principle there ought to be a difference made between the two cases, and I would venture to suggest that in the former case where the Subordinate Legislature has only a power to vary within the limits, the exercise of such power should either be express or at any rate be under circumstances

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or in terms tantamount to such express exercise of power. I cannot in the case before us see in the terms of the Legal Practitioners Act any express exercise of power or intention to abrogate any enactment of the Imperial Legislature or any circumstances or terms tantamount to such express exercise of power. Assuming however that the principles of construction applicable to this conflict between the Imperial enactment and the Indian enactment are exactly the same as those applicable to the earlier or later enactments of the same legislature, even then, I am unable to come to the conclusion that the Legal Practitioners Act should be deemed to have abrogated or rescinded the provisions of S. 3 of the Insolvency Act. The principle of the maxim *Generalia specialibus non derogant* is not only a proper rule of statutory construction, but is a rule based on good common sense. To take a common illustration, if a gentleman should give directions to his peon that a particular person should never be allowed to enter his house and some days afterwards give a general direction that all visitors should be admitted between certain hours, it cannot possibly be suggested that the later general direction was intended to cancel the particular order with regard to the particular person previously given. The principle on which such a rule of construction is based would appear to be that the cancellation or rescission of a previous special order could not have been intended if there is no indication whatever of the attention being drawn to such special order in connection with the mere general directions given subsequently. In other words, it being a question of intention of the legislature, unless there is something to indicate such intention or in the absence of anything to show that the attention of the legislature was specially drawn to the previous special provision, no such intention could be inferred from a mere general provision subsequently made. In S. 3 of the Indian Insolvency Act the special provision is not only to the effect that every Advocate or Attorney of the Supreme Court shall be entitled to practise in the way of his profession in the Court for the relief of insolvent debtors but there is the further proviso that no other person shall practise as Advocate or Attorney in the said Courts. It is a distinct affirmatively excluding provision. It is a provision not only special but special in a special sense, namely, that while declaring the right to practise of certain persons it expressly excludes from practice all other persons. Now the question is whether by the terms of S. 4 of the Legal

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Practitioners Act the Indian Legislature intended or should be deemed to have intended to abrogate or cancel the special provisions contained in S. 3 of 11 and 12 Vict., Ch. 21. It seems to me that no such intention could be inferred. Language much more apt than was used in S. 4 of the Legal Practitioners Act would and should have been used by the Indian Legislature if it was so intended. Further in the clause which specially enables High Court Vakils to practise in any Court in British India the words used are "any person so entered shall *notwithstanding anything herein contained* be entitled as such to practise." If the contention of the appellant in this case should be correct, the words used in that section should be not "*notwithstanding anything herein contained,*" but some such words as "*notwithstanding any law or provision of law to the contrary.*" It almost seems to me that the express limitation of the words to anything contained in the Act itself would rather seem to indicate that the intention of the legislature was not to interfere with any other special law or provision of law contained elsewhere. The words "as such" must have been put in, in order specially to prevent members of one branch of the profession claiming to practise as members of any of the other branches of the profession. I doubt however whether these words "as such" are apt enough by themselves to exclude High Court Vakils from practising in any Court in British India merely because previously to the Act, High Court Vakils were not allowed to practise in such Courts. But it is unnecessary to consider this point as, even apart from it, I have come to the conclusion that on a proper construction of S. 4 of the Legal Practitioners Act it could not be held that the provisions of S. 3 of the Indian Insolvency Act have been abrogated or repealed.

If therefore even after the passing of the Legal Practitioners Act, High Court Vakils had no right of audience in the Insolvency Court, it follows that when the Presidency Towns Insolvency Act was passed in 1909 they were not so entitled, and that even though the Insolvency Court became by reason of that Act merged in the High Court. By reason of the provisions of S. 121 of that Act nothing in any transfer of jurisdiction effected by that Act shall be deemed to confer any right of audience not possessed by any person at the time of the passing of the said Act, and as I have come to the conclusion that there was no such right previous to 1909 it follows that no such right could have been obtained merely

by reason of the merger of the Insolvency Court into the High Court under that Act. I therefore agree that the appeal fails and is liable to be dismissed.

A. S. V. *Appeal dismissed.*

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PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Lahore.)

PRESENT :—LORD DUNEDIN, LORD ATKINSON, LORD SUMNER AND SIR JOHN EDGE.

Umra ... *Appellant*

v.

The King-Emperor ... *Respondent*

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Penal Code, Ss. 302 *and* 396—*Conviction for murder—Statement to Police by accomplice—Death of accomplice—Objection to admissibility of statement—Other clear evidence of guilt—Special leave to appeal—Interpretation of Statute—Error in—If amounts to substantial or grave injustice.*

The conviction of an accused under S. 396, Indian Penal Code, was based on many pieces of evidence, one of which was the statement of an accomplice to the Police. The accused objected to the admissibility of the statement but the objection was overruled. On appeal, the High Court held that even apart from the statement there was other evidence which established his guilt, and confirmed the conviction, and at the same time held the statement of the accomplice was admissible. *Held,* special leave to appeal to His Majesty in Council on the ground that the admission of the accomplice's statement was wrong in law and amounted to a grave injustice and violation of the principles of natural justice would not be granted.

Where the evidence objected to is admitted by the Court on its construction and interpretation of certain sections of a statute, the interpretation even if it is erroneous in law will not amount to such substantial and grave injustice as to afford a basis for an appeal from the conviction to His Majesty in Council.

In re Dillett, L R 12 App. Cases 459 and *Vaithianatha Pillai* v. *The King-Emperor,* 40 I A 193 referred to.

Appeal from a judgment and decree of the High Court of Judicature at Lahore affirming the judgment of the Sessions Judge of Shahpur (31st August, 1923.)

On the 31st August, 1923, the petitioner was tried before the Sessions Judge and Assessors at Shahpur on the charge that he " on the night of the 26th, 27th December, 1922, at Mitha Tiwana, in company with one Misri and others, committed dacoity in the house of Jewandas and Jogdhian, in which dacoity Sarup Singh and Makhen Singh were shot, in

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consequence of which they subsequently died, and in which Sahib Devi and Daulat received injuries, and that he thereby committed an offence punishable under S. 396 of the Indian Penal Code," and convicted and sentenced to death. In the course of the trial the petitioner's pleader objected under S. 25 of the Evidence Act, 1872, and S. 162 of the Criminal Procedure Code, 1898 (as it was prior to its amendment by Act XVIII of 1923) to the admissibility in evidence of a statement made by Misri to the Police, incriminating himself and other participants in the dacoity. After making the statement, Misri had escaped from Police custody, maintained an armed resistance, and had been eventually shot and killed. It was therefore contended that if Misri himself had survived and been put on trial, it would have been clearly inadmissible, and it could not be admissible by reason of his death. The Trial Judge, however, overruled the objection, and admitted the statement under S. 32 (3) of the Evidence Act as one made by a deceased person. On appeal, this ruling, and the sentence and conviction were upheld by the High Court of Judicature at Lahore.

W. Wallach for petitioner.

A. M. Dunne, K. C. and *Kenworthy Brown* for respondent (the Secretary of State for India).

17th November, 1924. The reasons for the dismissal of the petition were delivered by

Lord Dunedin.

LORD DUNEDIN :—This is a petition for special leave to appeal against a sentence of death pronounced on the petitioner by the Sessions Judge of Shahpur and confirmed by the High Court at Lahore.

The petitioner, with others, organised a robbery in the house of a money-lender. They broke into the house at night and took ornaments, money and other things from the wife who was in the house (the money-lender himself being absent). Other persons arriving on the scene, two of the gang stationed on the roof fired shots and killed two persons. The conviction pronounced against the petitioner and four others was for the murder of these persons.

One Misri, one of the party, made a statement to the police, in which he detailed the incidents of the robbery and incriminated the various accused, including the petitioner. The admission of this statement was objected to by the vakil for the petitioner, but it was admitted by the Sessions

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Judge, and this admission was confirmed by the High Court. The ground for the present application is that the admission of the statement was clearly wrong and that the improper admission of this evidence amounted to a grave injustice and a violation of the principles of natural justice, and especial reference was made to the case of *Vaithianatha Pillai* v. *The King-Emperor*(1).

Their Lordships find that in the judgment of the High Court one of the learned Judges, while dealing with the point as to the admission of the evidence, expressed himself thus:—

"I do not suggest that in the present case, the statement of Misri is essential to the conviction, as I am satisfied that the rest of the evidence on the record establishes the guilt beyond any reasonable doubt."

And the other learned Judge agreed with these remarks. In view of this it seems to their Lordships out of the question that leave to appeal should be granted, as to do so would be to turn this Board into a Court of Criminal Appeal, a position which it has been again and again explained the Board will not assume. But, in view of the judgments given and the argument raised thereon, their Lordships feel constrained to add something more. The question of the admissibility of the evidence turned entirely on the interpretation of certain sections of the Code of Criminal Procedure and the Evidence Act. According to the view taken of these sections the evidence was or was not admissible. Now, although if there has been any departure from the ordinary rules of procedure such as to amount to a denial of ordinary justice, of which an illustration is given in *Pillai's case* (1), their Lordships will interfere ; yet where the matter depends upon the particular view taken of sections of an Indian Act their Lordships could not say that to assert that upon those sections the Judges had come to a wrong conclusion is tantamount to saying that there has been substantial and grave injustice done. Even, therefore, if there had not been the expression of opinion above quoted that the other evidence was sufficient, their Lordships would not have held that the so-called miscarriage of justice in respect of a wrong interpretation of the sections—as to the proper interpretation, their Lordships have not formed and expressed no opinion—is such as to bring the case within the rules laid down in *In re Dillet* (2), and insisted upon in subsequent cases.

1. (1913) L R 40 I A 193 : 25 M L J 518. 2. (1887) L R 12 A C 459.

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Their Lordships are, therefore, unable to advise the Sovereign to grant special leave to appeal.

Solicitors for petitioner : *T. L. Wilson and Co.*

Solicitor for respondent : *Solicitor, India Office.*

A. de M. *Special leave to appeal refused.*

PRIVY COUNCIL.

(On Appeal from the Court of the Judicial Commissioner of Oudh.)

PRESENT:—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

Fateh Singh and others ... *Plaintiffs* (Appellants)*

v.

Jagannath Baksh Singh and others ... *Defendants (Respondents).*

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Civil Procedure Code, S. 11, *Expl. IV and O.* 23, *R.* 1—*Suit for possession of ancestral property—Prior suit for declaration that gift thereof by Hindu widow was void—Defence that plaintiffs were not nearest reversioners—Plaintiffs' replication that nearest reversioner had colluded with defendants—Plaintiffs' application for amendment of plaint by adding averment of custom and claim for possession disallowed—Action dismissed, but liberty reserved to plaintiffs to file fresh suit for possession*—Res judicata.

In 1908 the first plaintiff along with others claiming to be presumptive heirs to certain ancestral property of a Hindu, instituted a suit for the cancellation, as void and ineffectual against them, of a deed of gift made by his widow, one of the defendants in the suit. The widow died before the trial of the suit, and the plaintiffs then applied to the Court for leave to amend their plaint by inserting therein (1) an allegation of her death, and of a custom prevailing in the family of the deceased Hindu,and among the Raekwar Thakurs, of which tribe he was a member, whereby the nearer and remoter heirs alike inherit the property of the deceased ancestor according to the shares of their respective fathers (*per stirpes*); and (2) a prayer for possession of a 10|16th share of the ancestral property. The Court dismissed the application, and subsequently the suit, but gave the plaintiffs liberty to bring a fresh suit for possession. Accordingly, in 1921, the plaintiffs, availing themselves of the liberty so reserved, brought an action for possession. The defendants pleaded that the dismissal of the first suit operated as a bar, under S. 11 of the Civil Procedure Code, 1908, to any subsequent proceedings in respect of the same property.

Held (affirming the judgment of the Court of the Judicial Commissioner), that the judgment in the prior suit was a bar to the second suit, and that as the case did not fall within O. 23, R. 1, the Civil Court had, after dismissing the suit, no power to reserve liberty for the plaintiffs to begin fresh proceedings.

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Anund Koer v. *Court of Wards,* 8 I A 14 ; *D. Persad Singh* v. *D. Konwari,* 5 I A 149 ; *Zemindar of Pittapuram* v. *Proprietors of the Mutta of Kolanka,* 5 I A 206 ; *Chand Kour* v. *Pertab Singh,* 15 I A 156 ; *Srimat Rajah Mootoo Vijaya* v. *Katama Nachiar,* 11 Moo. I. A. 73 ; and *Kailash Mondal* v. *Baroda Sundari Das,* I L R 24 Cal 711 referred to.

Appeal from a judgment and decree of the Court of the Judicial Commissioner (6th February, 1923) affirming a judgment and order of the Subordinate Judge of Bahraich (14th July, 1921).

On the 9th July, 1908, the appellants with others claiming to belong to the same family and to be descendants of a common ancestor, Chattarpal Singh, instituted a suit (No. 50 of 1908) in the Court of the Subordinate Judge of Bahraich against Musammat Har Kunwar (widow of Raghunath Singh), the present respondent No. 1, Ganga Baksh Singh (now represented by respondent No. 2) and Dildar Singh, for the cancellation as void of a deed of gift of the ancestral property executed by the said Har Kunwar on the 2nd June, 1908, in favour of the said first respondent (Jagannath Baksh Singh). Ganga Baksh Singh and Dildar Singh were reversioners and presumptive heirs of Raghunath Singh, and, not having joined the suit as plaintiffs, were brought in as third and fourth defendants respectively. The plaint alleged, *inter alia,* that Raghunath Singh, deceased, had a 1|3rd share in the ancestral property, which upon his death vested in his widow, the said Har Kunwar, for life, according to Hindu Law, without power of transfer, but that she had nevertheless conveyed and transferred it by way of gift to Jagannath Baksh Singh, the first respondent. The defendants in the suit pleaded that the plaintiffs were remoter in relationship to the common ancestor than Ganga Baksh Singh (one of the defendants) who, being the nearest reversioner, was the only person entitled to dispute the deed of gift. The plaintiffs met this by a replication affirming their right to sue by reason of Ganga Baksh Singh's indifference to his rights and not choosing to come in with them as a plaintiff, and his collusion with the other defendants. Certain issues were then fixed for trial, but before that could be tried or any evidence in fact taken, Har Kunwar died on the 10th February, 1909. Thereupon, on the 15th March, 1909, the plaintiffs in the suit applied to the Subordinate Judge for leave to amend their plaint by inserting therein (*a*) an allegation of the death of Har Kunwar, and of a custom prevailing among Raekwar Thakurs and in the family of the

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parties to the suit that the nearer and remoter heirs both inherit the property of a deceased ancestor according to the shares of their fathers (*per stirpes*) ; and (*b*) a prayer for possession of a 10|16th share of the property. The Subordinate Judge (Md. Abdul Ghani, Esq.) disallowed this application as unnecessary, remarking :—

"The real question in controversy between the parties was if the plaintiffs' suit could be maintained as against the nearest reversioner, Ganga Bakhsh. The defendants in their written statements had questioned the status of the plaintiffs for bringing the suit by pleading distinctly that, being one degree remoter than Ganga Baksh, they could not institute this suit. In their replication (para. 15), they exhausted all they had to say and what they could say in answer to the defendants' plea. The point of custom was never suggested to them. If there was in fact the custom set forth in the application for amendment, it should have been then set forth in their para. 15. It was essential to the disclosure of a cause of action in a declaratory suit as it would be in a suit for possession. The widow having died in February, 1909, could not possibly give the plaintiffs a right to set up the custom which they could not do in her lifetime."

* * * * * *

"There remains the question as to whether plaintiffs be permitted to add the prayer for possession. It is unnecessary to grant this prayer. The death of the lady has given the plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession.

"It is admitted, after disposing of this application disallowing the amendment, that the suit cannot proceed.

"I therefore order that the plaintiffs being one degree remoter to the last male owner than defendant No. 3, they have no cause of action. The suit must therefore be dismissed."

On the 8th February, 1921, the appellants, availing themselves of the right purporting to be reserved by the above decision, instituted the present suit in the same Court against (*a*) Jagannath Baksh Singh, who had been the second defendant in Suit No. 50 of 1908, (*b*) Bishunath Singh, son of Ganga Baksh Singh, the third defendant in the former suit (who had died on the 19th June, 1920), (*c*) Har Harbaksh Singh, and (*d*) Dildar Singh, who was the fourth defendant in the prior suit. The plaint, after setting forth the deaths of Raghunath Singh and of his widow, Har Kunwar, in succession, and of the custom as above, alleged that Jagannath Baksh Singh (the first respondent) and Ganga Baksh Singh (father of the second respondent) had, upon the death of the widow, usurped the property and combined to oust them (the appellants) from their rightful share therein. They therefore claimed (1) possession of a moiety of the said property, (2) mesne profits thereof from the 10th February, 1909,

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when, they alleged that, by the death of the widow, their cause of action accrued. The respondents' written statement (*a*) denied the existence of the alleged custom, (*b*) pleaded that the subject-matter of the action was *res judicata*, the appellants being, by reason of the above-mentioned judgment of the 15th March, 1909, in Suit No. 50 of 1908, estopped from bringing a fresh suit in respect of the same cause of action. The Subordinate Judge (M. H. Khan, Esq.) decided that this plea was good and dismissed the suit ; and his decision was affirmed upon appeal by the Court of the Judicial Commissioner (Dalal and Simpson, JJ.) on the 6th February, 1923. They held that the plaintiffs ought to have pleaded the alleged custom either in their plaint or replication in Suit No. 50 of 1908, and that the rejection of their application for leave to plead it at a later stage of that suit, though coupled with the liberty to bring a fresh action, did not confer on them any rights which they did not otherwise possess, nor enable them to come under the benefits of O. 23, R. 1 of the Civil Procedure Code, 1908.

The plaintiffs obtained special leave to appeal to His Majesty in Council.

A. de Mello for appellants :—Neither the cause of action nor the matter directly and substantially in issue in the two actions was the same. Further, the decision of the 15th March, 1909, related only to an interlocutory application by the plaintiffs in Suit No. 50 of 1908 to amend their plaint, and by no means decided the substantive matters at issue therein on their merits, nor finally adjudicate upon the rights of the parties. Lastly, the Court of the Subordinate Judge having in 1909 prevented the appellants from pleading the alleged custom and prayer for possession in the earlier suit cannot, logically, it is submitted, in 1921 penalise and prohibit them, as in effect it has done, from raising such plea or prayer in a separate and new suit. (He referred to the following cases : *Chand Kour* v. *Pertab Singh* (1) ; *K. K. Tagore* v. *Secretary of State* (2) ; *Sheosagar* v. *Sitaram* (3) ; *Kailash Mondal* v. *Baroda S. Das* (4) ; *Srimat Rajah Mootoo Vijaya* v. *Katama Nachiar* (5) ; and *Parsotam Gir* v. *Narbada Gir* (6).

J. M. Parikh for first respondent and *B. Dube* for second respondent were not called upon for a reply.

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1. (1888) L R 15 I A 156.
2. (1888) L R 15 I A 186.
3. (1897) L R 24 I A 50.
4. (1897) I L R 24 C 711.
5. (1866) 11 Moo I A 50 at 73.
6. (1899) L R 26 I A 175.

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17th November, 1924. The Judgment of the Board was delivered by

LORD PHILLIMORE :—This is an appeal by the plaintiffs from concurrent judgments against them given by the Subordinate Judge of Bahraich and affirmed by the Court of the Judicial Commissioner of Oudh.

It is a suit for possession of land, in which the defendants and present respondents raised as a first defence that the matter was *res judicata*, having already been decided between the same parties.

Both Courts being of this opinion and having determined this issue, found it unnecessary to determine any of the other issues and dismissed the suit.

The history of the case is as follows : The present appellants and plaintiffs with others filed a suit in July, 1908, against one Musammat Har Kunwar and the present defendant and respondent Jagannath Bakhsh Singh, and one Ganga Bakhsh, now represented by the defendant and respondent Bishunath Singh, in which they stated that Musammat Har Kunwar, being a Hindu widow, was in possession of her husband's property for the ordinary Hindu woman's estate, that they (the plaintiffs) and Ganga Bakhsh were the presumptive heirs of her husband, and that she, intending to defeat their succession, had purported to make a deed of gift of the property to Jagannath Bakhsh, her daughter's son ; and they claimed that the deed of gift might be declared void and illegal against them.

The defendants in that suit among other defences pleaded that the plaintiffs were not equal in degree with Ganga Bakhsh, but that he was the nearest reversioner and the only person entitled to dispute the deed of gift. To this the plaintiffs replied that if he were the nearer heir—

"even then the plaintiffs are entitled to maintain this suit on account of Ganga Bakhsh Singh's denial and his not joining the suit, owing to his indifference towards the preservation of his rights, having regard to his views expressed in the written statement and on account of his colluding with the defendants 1 and 2 ; and the defendants 1 and 2 cannot derive any benefit by setting up, a *jus tertii* in favour of Ganga Bakhsh Singh, as alleged by them."

In this state of the pleadings the widow died.

A suit for a declaration that a gift by a Hindu widow is void as against the reversionary heirs of her husband is one

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which is contemplated by the Specific Relief Act (Act I of 1877, S. 42), as is shown by the explanation lettered (*e*) to that section. But it is established that such a suit is *prima facie* competent only to the nearest prospective reversioner, and that if a more distant relation claims to sue, he can only maintain his suit by showing that the nearer reversioner has colluded with the widow, or for some similar reason.

The rule of law on this subject is stated in the case of *Rani Anund Koer* v. *The Court of Wards* (7) in the following terms :—

"Their Lordships are of opinion that though a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment...........

"The right to sue must, in their Loidships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient casue, to institute proceedings, or if he has precluded himself by his own act or conduct, from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue."

When the widow died, the question of collusion between Ganga Bakhsh and her became comparatively unimportant. By this event the question of reversionary heirship became settled, and if Ganga Bakhsh was the nearest heir, the plaintiffs could get no title to the property. They might indeed have brought their suit for declaration to a hearing for the purpose of determining in that suit the question of heirship as between them and Ganga Bakhsh, or to establish their averment of collusion in order to get the costs of the suit. But now that the widow was dead the real matter was to get possession ; and they accordingly endeavoured to turn their suit into one for possession.

It seemed, however, that if according to the ordinary Hindu Law of descent, Ganga Bakhsh was the heir, to the exclusion of the plaintiffs, that they must fail in such a suit. They were minded accordingly to make a new case, namely, that by a family custom they were equal in degree with Ganga Bakhsh and entitled as such to maintain a suit for possession.

Accordingly, they made an application in the suit setting forth the death of the widow and claiming that they had become entitled to institute a suit for possession, and that in order to show their right it had become necessary to mention

7. L R 8 I A 14.

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certain additional averments of fact in the plaint, the additional averments being allegations of the family custom and a statement as to the death of the widow, and the new relief claimed being a decree for possession of a ten-anna share in the property.

This application to amend came on for hearing on the 15th March, 1909, and the learned Judge rejected the application to be allowed to add the amendments averring the family custom, holding that it was an attempt to introduce a new case. When he had intimated that this was his opinion, the question remained whether the plaintiffs should be allowed to add their prayer for possession, and whether it was worth while continuing the suit. It was admitted by the plaintiffs' counsel that, apart from custom, they were one degree more remote than Ganga Bakhsh, and that if they could not make the case of a family custom, their suit must fail ; and the learned Judge thereupon dismissed it with costs ; and from this decision there was no appeal. He did, however, in the course of his judgment use the following expressions, which will need consideration :—

"The death of the lady has given the plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession."

The plaintiffs took no further steps till the 5th February, 1921. In the meantime one of the present defendants brought an action against the other ; and the parties compromised on the terms of each taking one-half.

In the present suit brought on the 5th February, 1921, the plaintiffs are claiming possession of one-half of the property, founding their title on family custom. To this the defendants, besides denying the custom and asserting the validity of the widow's gift, have pleaded that the suit was barred by S. 11 of the Code of Civil Procedure as raising a question which had already been heard and decided. Both Courts, as already stated, took this view, and without going into other portions of the case, dismissed the suit. In their Lordships' opinion their decisions were right.

The language of the section in question is as follows :—

"No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such

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subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

With this must be read :—

"*Explanation IV* :—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

When the plaintiffs brought their first suit, they had to show their title to impeach the widow's gift. For this purpose they had to show either that they were some at least of the nearest reversionary heirs, or that the only nearer reversionary heir had colluded with the widow. In their plaint they did not rely on collusion, which they only introduced in their replication. Taking, however, that view of the pleadings which is most favourable to them and treating them as relying equally on both grounds of claim, it is now clear that they can only make out a claim to be some of the next reversioners on the footing of the family custom, and that the allegation of that custom therefore was an allegation which "might and ought to have been made" within the meaning of Explanation IV.

Or, to put it in another way. One of the alternative cases on which they were basing their title to sue was their nearness of kin, and to prove their nearness of kin it was essential to aver the family custom. They claimed as next heirs, and their claim was dismissed. They cannot fight it over again.

But, as the Judges in the Court of the Judicial Commissioner have observed, some complication was introduced by the language of the Judge who tried the first case and by his expressing himself as if he had power to give leave to bring a fresh suit. It was contended on behalf of the plaintiffs that in so expressing himself he was purporting to exercise the powers given to the Court by O. 23, which allows the Court in certain cases to grant the plaintiff permission to withdraw from a suit with liberty to issue a fresh suit, in which case the bar against a fresh suit which is otherwise imposed on a plaintiff who abandons his first suit is removed.

The same point was raised at their Lordships' bar, but their Lordships agree with the Court of the Judicial Commissioner that it is not a good one. There was no application for leave to withdraw the suit, nor was it withdrawn : it was dismissed. And the power of the learned Judge ceased upon

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this dismissal. It may have been unfortunate for the plaintiffs that the learned Judge thought that he had a power which he did not possess, but happily, as the Judges on the appeal observed, it is improbable that there was substance in the claim which they have been prevented from further prosecuting

In passing it may be observed that if the learned Judge thought that he was exercising power under O. 23, he must also have thought that the subject-matter of any future suit would be the same subject-matter as that of the suit which he dismissed. This confirms the view which the Courts below and their Lordships have taken.

Several authorities upon the construction of S. 11 of the Code of Civil Procedure were cited, which it was suggested put a construction on Explanation IV which was favourable to the plaintiffs. They have been considered by their Lordships ; but, in fact, they have no bearing upon the present case.

Perhaps the one which requires the most careful examination is that of *Doorga Persad Singh* v. *Doorga Konwari* (8): because in that case their Lordships intimated that the plaintiff would not be barred from setting up a family custom of descent upon the death of a widow by reason of his having in a previous suit in which he was a defendant averred the family custom as entitling him to oust the widow during her life and having failed on this point. But they held that as to the immediate point then under consideration he was barred, and after citing a very strong passage from 11 Moore's I. A. p. 73, they proceeded to express themselves as follows :—

"If the defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time."

In *Zemindar of Pittapuram* v. *Proprietors of the Mutta of Kolanka* (9) the plaintiff had brought a previous suit which had failed against his grandfather's widow and certain other defendants; and some of the defendants to the second suit might have been held to be successors in title to some of the defendants in the previous suit. But in the view which the Judicial Committee took of the facts, there were three properties concerned in the first suit, (1), (2) and (3), and numbers (1) and (2) were not in question in

8. L R 5 I A 149.

9. L R 5 I A 206.

the second suit; while as regards number (3) no case was made in the first suit affecting the defendants in the second suit, and the only way in which number (3) came into the first suit was because the plaintiffs at that time sought to restrain the widow (since dead and not a party to the second suit) from waste. This being so, nothing had been decided in the first suit which affected the question of the title of the plaintiff to property number (3), and as to it, there was held to be no case of *res judicata.*

Mussummat Chand Kour v. *Pertab Singh* (1) was a suit by reversionary heirs alleging the intention of a widow to injure their right by selling or mortgaging the property, which failed, and then a second suit to set aside an actual deed of gift. This second suit was upon the construction of the earlier Act then in force, held to be a suit upon "a different and subsequent cause of action to that relied upon in the first suit." It may be added that in that case the failure of the first suit was caused by the non-appearance of the plaintiff at the trial, and inasmuch as the first suit might have failed in either of two respects (either the plaintiff might have no title or the widow might not have been threatening to sell or mortgage), a mere dismissal for non-appearance could not be held to determine that the plaintiff had failed for want of title.

Lastly, their Lordships would refer to the case of *Kailash Mondal* v. *Baroda Sundari Das* (4) decided in the High Court at Calcutta. In that case the plaintiff had sued the defendant for rent, and the defendant had pleaded abatement and had adduced no evidence in support of his plea, so that the plaintiff recovered judgment. Many years after the plaintiff sued the defendant for the rent subsequently accruing, and the defendant sought to raise various defences. It was contended, and so held in the lower Courts, that the matter was *res judicata,* and concluded in favour of the plaintiff. But the High Court held that it did not follow because rent was due from the defendant in one year that it was necessarily due in later years; and this seems obvious, for the position of either of the parties might have changed. Maclean, C. J. said that it might be that on looking further into the matter some particular issue might be found to have been previously decided, and then the principle of *res judicata* might apply; but that as the matter stood it did not necessarily so appear.

1. (1888) L R 15 I A 156. 4. (1897) I L R 24 C 711.

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Banerjee, J., it is true, made some observations upon those words "heard and finally decided," which appeared in the old Act and are in the present Code; and to these observations, couched in language not so careful as it might have been, undue prominence has been given by the reporter in the summary of the case which appears in the head-note. But in the actual decision there is no conflict with the established authorities.

The other cases which were brought by the learned Counsel for the appellants before their Lordships have, in their Lordships' judgment, no bearing upon the present decision. Upon the whole, therefore, their Lordships agree with the Courts below that this is a case of *res judicata*, and that the defence succeeded.

Their Lordships will therefore humbly recommend His Majesty that this appeal should be dismissed with costs; but the respondents must have only one set of costs between them.

Solicitor for appellants: *E. Dalgado.*

Solicitors for 1st respondent: *T. L. Wilson and Co.*

Solicitor for 2nd respondent: *H. S. L. Polak.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

Ammathayi Ammal ... *Appellant** (*Defendant-respondent*)

v.

Sivarama Pillai ... *Respondent* (*Plaintiff-petitioner*).

Ammathayi Ammal v. Sivarama Pillai.

Limitation Act, Art. 181—*Mortgage suit—Preliminary decree—Application for final decree—Time for—When begins to run—Suit challenging title of mortgagor—Pendency of—Effect—No suspension of limitation—Limitation Act exhaustive as regards suspension of limitation.*

A preliminary decree was passed on 6th November, 1916 in a suit on a hypothecation bond and the time for redemption was fixed as four months. Pending the mortgage suit, the husband of the mortgagor filed a suit on 13th June, 1916 against the mortgagor and mortgagee for a declaration that the hypotheca was his. The suit was decreed in his favour on 26th April, 1917 but was ultimately reversed in second appeal on 28th April, 1920. The

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*Second Appeal No. 200 of 1922. 27th August, 1924.

mortgagee thereupon applied for the passing of a final decree on 10th September, 1920. *Held,* Art. 181 of the Limitation Act applied and the period of 3 years began to run from 6th March, 1917, the date fixed for redemption, and hence the application was barred.

The period fixed by Art. 181 could not be extended by reason of the pendency of proceedings in Court with regard to the title of the mortgagor. Where time has once begun to run, it cannot be suspended by reason of proceedings in Courts unless an injunction is obtained against proceeding with the application or stay order has been obtained. 25 C W N 376 ; 35 Cal 299 ; 43 Cal 660 : 30 M L J 529 (P C) distinguished.

Courts of law cannot introduce new periods of limitation based on grounds of equity. The Limitation Act is complete in itself and any ground for extension of time, or for the suspension of time, must be sought for within the four corners of the Act itself. 43 Mad. 185 : 38 M. L. J. 1 (F. B.) ; 46 Cal. 694 : 36 M. L. J. 210 (P. C.) ; 35 All. 227 (P. C.) followed.

Second Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 81 of 1921 (A. S. No. 55 of 1921, District Court, South Arcot), preferred against the decree of the Court of the District Munsif of Vridhachalam, in I. A. No. 869 of 1920, in O. S. No. 746 of 1915.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for appellant.

T. M. Krishnaswami Aiyar for the *Advocate-General* and *M. S. Venkatrama Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff brought the suit on a hypothecation bond executed in his favour by the defendant. A preliminary decree was passed on 6th November, 1916. Four months' time was allowed for payment. The plaintiff applied for a final decree on 5th November, 1919. His application was dismissed, for non-payment of batta, on 10th January, 1920. He applied again for the passing of a final decree on 10th September, 1920. The defendant contended that the application for the final decree was barred by limitation under Art. 181. The District Munsif disallowed the objection of the defendant and passed a final decree. The defendant appealed and the Subordinate Judge dismissed the appeal. He now prefers this Second Appeal.

It is contended by Mr. T. S. Ramaswami Aiyar, who appears for the appellant, that Art. 181 of the Limitation Act applies to applications for the passing of a final decree. It is well settled that Art. 181 applies to an application by

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the plaintiff for the passing of a final decree—vide *Pattabirama Naidu* v. *Subramania Chetti* (1), *Mummadi Venkatiah* v. *Boganatham Venkatasubbiah* (2) and *Ahmad Khan* v. *Mussammat Gaura* (3). The time for applying, for the passing of a final decree, began to run from 6th March, 1917, and it is urged by the appellant that the application having been made, on 10th September, 1920, more than three years after the time began to run, the application is barred.

Mr. T. M. Krishnaswami Aiyar, who appears for the respondent, urges that his client could not have applied to the District Munsif for the passing of a final decree, as there was an adjudication by a Court that the hypotheca did not belong to the defendant, mortgagor. The defendant's husband brought a suit O. S. No. 674 of 1916, on 13th June, 1916, against the present plaintiff, as first defendant, and the defendant herein, as the 2nd defendant, for a declaration that the hypotheca was his. That suit was decreed in plaintiff's favour on 26th April, 1917. The first defendant, that is the plaintiff in the present suit, filed an appeal to the District Court which was dismissed. He preferred S. A. No. 979 of 1919 and the High Court held that the plaintiff in that suit had no title to the property and that it was the property of the defendant therein and dismissed the suit. The contention of Mr. Krishnaswami Aiyar is that, as there was a valid decree in favour of the plaintiff in O. S. No. 674 of 1916, that the property which was mortgaged to the plaintiff herein was his and that the mortgagor had no title, he could not have asked the District Munsif to pass a final decree in his favour and to have the property sold, and that he could only apply after the decree in that suit was set aside by the High Court. His contention is that during the pendency of Suit No. 674 of 1916, there was a suspension of his right to apply for a final decree and time did not begin to run against him. He relies upon an observation of their Lordships of the Privy Council in *Kala Mea* v. *Harperink* (4) : "It has been laid down again and again that in sales under the direction of the Court, it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below

1. (1917) 7 L W 438. 2. (1921) 42 M L J 51.
3. (1917) I L R 40 All 235. 4. (1908) I L R 36 C 323 at 334 (P C).

the standard of honesty, which it exacts from those on whom it has to pass judgment."

His argument is that the executing Court could not convey a good title to the purchaser and therefore the Court could not sell the hypotheca, as the property of the mortgagor, when there was the decision of a competent Court that the hypotheca did not belong to the mortgagor. This argument assumes that the Court when it sells property guarantees the title of the judgment-debtor. All that the Court does is to sell the right, title and interest of the judgment-debtor. It does not guarantee that the judgment-debtor has a good saleable title.

In mortgage suits, a preliminary decree is passed and time is fixed for payment of the decree amount. The plaintiff has to apply for the passing of a final decree, within the time allowed by law, that is, three years from the date of the time fixed for payment. The question is whether the period given in Art. 181 can be extended in favour of the plaintiff by reason of the pendency of proceedings in Courts, with regard to the title of the mortgagor. Whether the mortgagor has title to the mortgaged properties or not the plaintiff has to apply for the passing of a final decree within the time fixed. If a personal remedy is outstanding, he can pursue the personal remedy, only after getting the mortgaged property sold by the Court. In order to enable him to do that he must apply for a final decree. It is only after the passing of the final decree and after having brought the mortgaged property to sale, that he could proceed against the person of the mortgagor, if any portion of the decree remains unsatisfied. In this case, the personal remedy was outstanding, as is clear from the decree. The plaintiff, therefore, even if he got nothing by the sale of the hypotheca, could have proceeded against the other properties of the mortgagor for the amount of his decree. But even if the personal remedy was not outstanding, it is the duty of the plaintiff to apply for a final decree, within the time allowed by law.

Mr. Krishnaswami Aiyar's contention is that his client had lost the right to apply, by reason of the decision in O. S. No. 674 of 1916, and it was only after that decision was upset in second appeal, that his right to apply for a final decree was revived. It is difficult to accept this contention. When time has once begun to run, it cannot be suspended, by reason

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of the proceedings in Courts, unless an injunction was obtained against proceeding with his application, or a stay order had been obtained staying the proceedings. In this case, no injunction was obtained against the plaintiff and no stay was ordered of the proceedings in the suit, out of which this second appeal arises. Mr. Krishnaswami Aiyar relies upon *Hemendra Mohan Khasnobis* v. *Dharaninath Chanda Roy* (5) for the position that his right to apply was lost on the passing of the decree in O. S. No. 674 of 1916 during the time in which that judgment was in force.

In that case, the facts were these : A third mortgagee obtained a preliminary decree and the last day for payment was 31st July, 1911. Payment not having been made, he made an application for a final decree, on 2nd October, 1915. Prior to that date, the second mortgagee instituted a suit to enforce his security, in which the High Court expressed the opinion, on 10th March, 1914, that the third mortgagee could not sell the property before he had paid up the second mortgagee. The second mortgagee was paid on 22nd May, 1915. Mookerjee, the Officiating Chief Justice, and Fletcher, J., held that assuming Art. 181 of the Limitation Act was applicable to the case, the application dated 2nd October, 1915, was not barred by limitation. In that case, the High Court had expressed the opinion rightly or wrongly, on 10th March, 1914, that the third mortgagee could not sell the property before he paid up the second mortgagee. Further the sum due to the third mortgagee could not have been determined till the sum payable to the second mortgagee for redemption had been settled. The third mortgagee was therefore not in a position to apply for final decree, by reason of the decision of the High Court, in the suit brought by the second mortgagee. In the present case, the plaintiff was not asked to do anything before he could apply for a final decree. The case in *Hemendra Mohan Khasnobis* v. *Dharaninath Chanda Roy* (5) is therefore distinguishable on the facts from the present case. In *Lakhan Chunder Sen* v. *Madhusudan Sen* (6) the facts were :—A Hindu died leaving three sons. The sons of the third son instituted a suit for possession of their shares against the first son and the second son. The first and second sons died pending the decision of the suit and their sons were brought on record. Decree was passed on 20th April, 1903, in favour of the plaintiffs and it was further

5. (1920) 25 C W N 376. 6. (1907) I L R 35 C 209.

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declared that the sons of the second defendant were entitled to the share they claimed. The sons of the first defendant appealed on 22nd February, 1904, and the Appellate Court confined the decree in favour of the plaintiffs, that is, the sons of the third son, and set aside the decree, so far as it related to the sons of the second son. The sons of the second son instituted a suit on the 14th November, 1904, against the sons of the first son and the sons of the third son for possession, partition and accounts. The High Court held that during the time the suit of the third son was pending, that is, between 20th April, 1903 and 22nd February, 1904, the right of the plaintiff to bring an action was suspended. The learned Chief Justice observes at page 217 : " It seems to us, however, that this was a decree, which so long as it stood undischarged was susceptible of execution at the hands of the present appellants, and whilst that decree existed, it was not open to them in the circumstances to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit. "

This judgment was affirmed on appeal by the Privy Council—vide *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (7). In that case, the right of the parties was under litigation. The sons of the second son were granted relief in the first suit and therefore they could not bring a second suit, for getting the relief, which they had already obtained. No such considerations apply to the present case.

Reliance is placed by the respondent upon the Full Bench ruling in *Muthu Korakki Chetty* v. *Madar Ammal*(8). In that case, there was a Court sale, on the 26th April 1913. An application was made on the 3rd January, 1914, to set it aside on the ground of fraud and it was set aside, on the 25th June 1915, as to part of the properties sold. The auction purchaser applied for delivery on the 17th February 1917, for delivery of the remaining properties. The Full Bench held that the application was not barred by limitation. In that case, the sale itself was sought to be set aside, on the ground of fraud and, though the Court had confirmed the sale, yet when an application to set it aside was made, on the ground of fraud, it was bound to entertain the application and consider it on the merits ; and as long as that application was pending it could not order delivery of property under the sale, when

7. (1916) I L R 43 C 660 : 30 M L J 529 (P C).
8. (1919) I L R 43 M 185 : 38 M L J 1 (F B).

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the sale itself was being impeached, on the ground of fraud. It was only after the dismissal of the application, for setting aside the sale, that the Court could order delivery of the property. The facts of that case are distinguishable from the facts of this case, as here there was no obstacle in the way of the plaintiff, which could have prevented him from applying for an order for sale. Moreover the wording of Art. 181 is different from that of Art. 180. In the case of Art. 180, the time to apply for delivery is when the sale becomes absolute. But under Art. 181 the time begins to run from the date on which the right to apply accrues. The right to apply accrued on the expiry of the time fixed for payment, that is 6th March 1917. The Article does not say that the right to apply accrues only when the title becomes clear. The Full Bench decision in *Muthu Korakki Chetty* v. *Madar Ammal*(8) turned upon the wording of the Art. 180 and upon the fact that the purchaser could not apply for the delivery of the property when the sale itself was being sought to be set aside on the ground of fraud. But the observations of the learned Officiating Chief Justice in that case are against the contention of the respondent. Referring to *Lakhan Chunder Sen* v. *Madhusudan Sen* (6) and *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (7). Abdur Rahim, Officiating Chief Justice, observes :— " But it is hardly to be inferred from such observations that the Privy Council intended to lay down any rule or rules for exclusion of time other than those mentioned in various sections of the Limitation Act, such as 12, 14, etc., or that when time has once begun to run, it will be suspended otherwise than according to the provisions of S. 9, or any other similar provision of the Limitation Act itself." He further observes at p. 201 : " I must however observe that it would almost look that in my judgment in *Secretary of State* v. *Raja Vadrevu Ranganayakamma* (9). I tried to deduce from those cases a principle of general and unlimited application to the effect that where the rights of the parties have been subjected to determination by the Court, it is from the date of the determination of such rights that limitation should be computed. But on further consideration I am persuaded that any such deduction would be unjustified if it be meant thereby to introduce

6. (1907) I L R 35 Cal 209.
7. (1916) I L R 43 Cal 660 : 30 M L J 529 (P C).
8. (1919) I L R 43 M 185 : 38 M L J 1 (F B).
9. Appeal Nos. 113 and 402 of 1917 (unreported).

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a rule of exclusion or suspension of time covering a larger ground than that traversed by Ss. 12, 14, 15, 16, 9 and other similar provisions of the Limitation Act."

It is clear from that judgment that the Court cannot introduce a new period of limitation on any ground of equity. The Limitation Act is complete in itself and any ground for extension of time, or for the suspension of time, must be sought for within the four corners of the Act itself. After the case was argued, Mr. N. Rajagopalachariar, the Assistant Law Reporter, brought to my notice *Mani Singh Mandata* v. *Nawab Bahadur of Murshidabad* (10). In that case, the appellant was declared to be a disqualified proprietor and her estate was taken charge of by the Court of Wards under the Bengal Act, IX of 1879. By a deed of transfer, dated 7th June, 1890, part of the estate was sold by the Collector, as manager to the father and predecessor-in-title of the respondent, and the purchaser obtained possession on 30th April, 1891. On 1st August, 1911, the Court of Wards withdrew from the management of the estate. The appellant brought a suit on 12th May, 1912, to recover possession of the portions sold. It was held that her suit was barred by limitation and that limitation did not cease to run, because she was declared to be a disqualified owner, and the estate was in charge of the Court of Wards. Their Lordships of the Privy Council observe at p. 699 : "The Limitation Act, it is true, recognizes and enumerates certain conditions as legal disabilities, entitling the persons affected by them to an extended period of limitation. But the plaintiff's disqualification, under S. 6 (*a*) of the Court of Wards Act, is not one of them, nor has any case been made, which could suspend or modify the ordinary law of limitation as applicable to this case."

Though the appellant, in that case, could not have brought a suit by reason of S. 6 (*a*) of the Court of Wards Act during the time the estate was under the Court of Wards, yet the Privy Council held that that would not extend the period of limitation in her favour.

If once time has begun to run, it cannot be suspended by reason of the proceedings in any Court unless the facts could be brought within one of the sections of the Limitation Act, which lay down the conditions under which the running of time

10. (1918) I L R 46 C. 694 : 36 M L J 210 (P C).

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is suspended. In this case, the time for applying for final decree began to run from the 6th March, 1917, and the decree in the second suit was not passed till the 26th April, 1917. Time having begun to run against the plaintiff, it could not have been suspended by reason of a subsequent decision. In *Soni Ram* v. *Kanhaiya Lal* (11) it was held by the Privy Council that there was nothing in Act XV of 1877 which would justify the Board in holding that once the period of limitation had begun to run in the case it could be suspended. S. 9 of the Limitation Act of 1908 expressly enacts that where once time has begun to run, no subsequent disability or inability to sue stops it. Oldfield, J., in *Muthu Korakki Chetty* v. *Madar Ammal* (8) expressed the same opinion that "once a cause of action has arisen it is not suspended by later events."

In *Huro Pershad Roy* v. *Gopal Das Dutt* (12) the Privy Council held that a landlord who could have brought a suit for the rent for a certain fasli was not entitled to bring a suit after the expiry of one year on the ground that his suit against the tenants, in respect of the arrears of rent, for the previous year was pending. Their Lordships observe at page 259 : "Here there was no period of time in which the rent could not have been recovered. There was no period of time in which, therefore, the statute might not have run."

It is quite clear from the authorities that if time once begins to run, it cannot be stopped or suspended by reason of any disability that may have happened or occurred. Subsequently in this case, as I have already pointed out, the plaintiff was not debarred from applying for the passing of a final decree. The contention of the appellant therefore prevails.

In the view I have taken, it is unnecessary to decide in this case the question whether a second application, even if within three years, is barred, by reason of the dismissal of a previous application, for the passing of a final decree.

In the result, the appeal is allowed, and the plaintiff's application for the passing of a final decree is dismissed with costs throughout.

T. S. V. *Appeal allowed.*

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8. (1919) I L R 43 M 185 : 38 M L J 1 (F B).
11. (1913) I L R 35 All. 227 : 25 M L J 131 (P C).
12. (1882) I L R 9 C 255 (P C).

PRIVY COUNCIL

(On appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

Palani Ammal ... *Appellant**

v.

Muthuvenkatachala Moniagar and others ... *Respondents.*

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Palani Ammal v Muthuvenkatachala Moniagar.

Hindu Law—Joint family—Partition—Presumption—Mode of effecting partition—Ascertainment of shares—Effect—Separation of one member—Status of other members—Effect on—Re-union—Proof of—Onus—Separation of one member—Proof of—Partition suit by him—Effect—Withdrawal of suit by him—Effect—Decree in suit—Date of severance in such case—Partition or no partition—Question as to, depending upon documentary evidence—Finding based on such evidence—Fact or Law—Joint family with impartible estate descending according to rule of lenial primogeniture with rights of maintenance and other privileges to junior members—Possibility in law of.

A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated.

The coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property among themselves. But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated.

A member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them.

If a joint Hindu family separates, the family or any members of it may again re-unite as a joint Hindu family, but such a re-uniting must be strictly proved as any other disputed fact is proved.

The fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed, the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. Where a member of a joint Hindu family files a plaint claiming a partition but afterwards withdraws it, no severance of the joint status results. But such a plaint, even if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained.

In a suit for partition which proceeds to a decree which is made, the decree for a partition is the evidence to show whether the separation was only a

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separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other.

In a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known, are parties to the suit, and it is the decree alone which can be evidence of what was decreed.

Where the question whether the members of a joint family did or did not separate depends upon the construction of a number of documents exhibited in the case, the Court must construe the documents according to their legal effect, but is entitled to draw all legitimate inferences as to the intentions of the parties to them, and the inferences so drawn are findings of facts.

Held, affirming the H. C., that the joint family descended from the propositus never separated.

A joint-family with an impartible estate, descending according to a rule of lineal primogeniture with rights of maintenance and other privileges for the junior members cannot be established in modern times.

Appeal from a decree of the High Court of judicature at Madras (29th August, 1917) which affirmed a decree of the District Judge of Madura (F. H. Hamnett, Esq.) dated the 23rd April, 1909.

The material facts are set out in the judgment of their Lordships.

B. Dube for appellant.

W. Wallach for respondents.

20th November, 1924. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—This is an appeal by Palani Ammal, a Hindu lady, who is one of several defendants, from a decree, dated the 29th August, 1917, of the High Court at Madras, which affirmed a decree for partition of the Vadimitta estate, dated the 23rd April, 1909, of the District Judge of Madura.

The estate in question, which appears to be a large zamindari, was purchased by Peraiyar Muthukumaraswami, who died in 1834. He was a Hindu Sudra, who and his descendants were governed by the law of the Mitakshara. His descendants, unless they separated, constituted a Mitakshara joint family, the property of which was in law joint property unless the contrary was proved. For the sake of brevity he will hereafter be referred to as the propositus. The propositus had two wives ; by the senior wife he had six sons, most of whom married and left male issue, by his junior wife he had one son, who left male issue. It is stated in the judgment of Sastri, J., in this case, and doubtless correctly, that "the property admittedly continued to be in the possession and enjoyment

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of the descendants of the first son of the propositus." As the family was not an ancient family, the property, which was acquired in quite modern times, was in the possession of the senior son and his descendants as managers of the joint family and not as the senior male member of a joint family.

There are two questions in this suit and in this appeal upon which there are concurrent findings of the District Judge and the High Court. Those questions are whether the principal parties to the suit are bound by an award which was made by some arbitrators, who have been made defendants to the suit, and if they are not bound by the award, then the question arises whether the joint family which descended from the propositus ever separated.

The question relating to the award may be disposed of at once. The District Judge and the High Court found, for reasons which their Lordships consider to have fully justified their findings, that the award was not binding upon any of the parties. No argument has been addressed to their Lordships in this appeal in support of the award, and they accept the concurrent findings that it is not binding as correct. The sole appellant, Palani Ammal, claimed that some of the estate sought to be partitioned had vested under the award in her. Her claim under the award fails, but as she appears, when suit for partition was brought, to have been in possession of part of the estate, the right of the plaintiffs to a decree for partition must be established, and it is necessary to consider whether the joint family had ever separated.

It is beyond question that the estate which the propositus had purchased vested on his death, in 1834, if not on the purchase, in the joint family, and was held jointly by the male members of the joint family as coparceners. Their Lordships do not know whether the estate was purchased with joint family money or with self-acquired funds of the propositus, but for the purposes of this judgment they will assume that the estate did not vest in the joint family until the death of the propositus.

In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a

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joint family, and on separation are entitled to partition the joint family property amongst themselves, is now well-established law. An authority for that proposition is the judgment of the Board in *Appuvier* v. *Rama Subba Aiyan* (1), which applies to joint families such as the joint family which descended from the propositus. But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be. It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a re-uniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is *Balabux Laduram* v. *Rukhmabai* (2).

The fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In *Kedar Nath* v. *Ratan Singh* (3), a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it, and the Board held that no severance of the joint status resulted. Their Lordships see no reason to depart from that view, although such a plaint,

1. (1866) 11 Moore's I A 75. 2. (1903) L R 30 I A 130.
3. (1910) L R 37 I A 161 : 20 M L J 900.

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even if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained [see *Girja Bai* v. *Sudashiv Dhundiraj* (4) and *Kawal Nain* v. *Budh Singh* (5).] In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known, are parties to the suit, and that it is the decree alone which can be evidence of what was decreed.

With the observations which their Lordships have already made, they will proceed to consider whether the joint family which descended from the propositus ever separated. It will be necessary for their Lordships in referring to evidence to refer only to such evidence as they consider is material. In this present case there were concurrent judgments of the District Judge and the High Court that the family descended from the propositus never separated, and that the property sought to be partitioned is partible. The onus of proving that there had been an effective separation was upon the defendants. The Courts below were, as their Lordships are, obliged to construe documents according to their legal effect, but the Courts below were, and their Lordships are, entitled to draw all legitimate inferences as to the intentions of the parties to them, and the inferences so drawn are findings of facts.

As was pointed out by Sastri, J., in his judgment in this case, that so far as division or non-division of the estate is concerned, " there has been no formal partition deed between the various members of the family, and it is not alleged that the estate was at any time divided by metes and bounds." The defendants, whose case is that the estate, of which partition is claimed, is not now partible, rely upon certain decrees and documents as showing that the estate was divided and partitioned between descendants of the propositus and that the joint family had ceased to remain joint.

In 1842 a suit was filed in the District Court of Tinnevelly by some of the sons of the propositus against his eldest son claiming that the estate should be divided according to his will,

4. (1916) L R 43 I A 151 : 31 M L J 455.
5. (1917) L R 44 I A 159 : 33 M L J 42.

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The District Judge in 1846 found rightly that the division made by the propositus was invalid in law, but he made an equally invalid decree declaring that the sons of the first wife were entitled to one-half of the estate and the son of the second wife to the other half of the estate. On the 23rd July, 1849, the Suddar Adalat Court in appeal held that all the sons were entitled to equal shares, but held that the Court was not called upon to sub-divide the estate in accordance with the law of inheritance, no such question being before the Court, and decided —" 37. It is, therefore, left for the heirs, or for such of them as may be dissatisfied with the management of the joint estate by the head of the family, to adopt such a course of proceeding as they may see fit to obtain the surrender to them of their respective portion or portions of the estate." A razinama had been filed in that suit on the 1st June, 1846, by the great-grandfather of the plaintiffs in this suit stating that he no longer wished to press the eldest son for a partition of the family estate.

After the decree of the Suddar Adalat of 1849 a son of the fifth son of the propositus brought a suit in the Zilla Court of Tinnevelly in 1849 against the eldest son of the propositus for a fifth share in the estate, and the defendant in that suit pleaded that the then plaintiff's father had in a previous suit admitted that the estate ought to be held according to the law of primogeniture and had renounced all claim to a division of the estate. The Zilla Court on 22nd January, 1852, holding that the Suddar Adalat in 1849 had held that the estate was divisible gave the then plaintiff a decree for a one-fifth share in the estate. On the 31st October, 1870, the widow of the plaintiff of the suit in the Zilla Court sold her deceased husband's interest in the estate to the son of the first son of the propositus, who was the father of Ponnusami Moniagar who was the brother, deceased without issue, of the appellant, Palani Ammal.

Their Lordships have in considering the facts in this appeal had the great advantage of the very careful and elaborate judgments which were delivered in the appeal to the High Court by Sir John Wallis, C. J., and Sastri, J., and they agree with their conclusions as to the facts. Their Lordships have no doubt that this joint family never did separate.

Their Lordships think that so far from the members of that joint family intending to separate, their object probably

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was to establish themselves, if possible, as a joint family with an impartible estate descending according to a rule of lineal primogeniture with rights of maintenance and other privileges for the junior members. Such a joint family could not be established in modern times.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant : *H. S. L. Polak.*

Solicitor for respondents : *E. Dalgado.*

A. de M. *Appeal dismissel.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE VENKATASUBBA RAO.

Ramakka ... *Appellant** (*Counter-petitioner*)

v.

V. Negasam ... *Respondent* (*Petitioner-4th defdt.*).

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Civil Procedure Code, S. 2 (12), *O.* 26, *R.* 10—*Mesne profits—Claim for—Claimant in the position of plaintiff—Burden of proof—Local investigation—Evidence obtained in—Effect of not reducing into writing—If legal evidence—Evidence Act, Ss.* 106, 145—*Previous statements—Cross-examination on—When attention of witness to be called to writing.*

When a party to a suit claims mesne profits he is in the position of a plaintiff, and if he adduces no evidence at all no mesne profits can be awarded to him. S. 2 (12), Civil Procedure Code, defines mesne profits as those profits which a person in wrongful possession of such property actually received or might, with ordinary diligence, have received. What a person actually received is a matter within his peculiar knowledge and under S. 106 of the Evidence Act the burden of proving it is on him ; but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them. 8 Cal 343 ; 3 W R (Mis) 25 ; 9 C L R 1 referred to.

Where a commission for local investigation is issued to ascertain mesne profits, evidence obtained as a result thereof should be reduced to writing as provided in O. 26, R. 10. Information given by witnesses which is not reduced to writing is not legal evidence upon which a Court can act. The principle of law is that a Court cannot act on information received in the absence of the parties nor can it base its judgment on its own knowledge of the facts. *Harvey* v. *Shelton,* (1844) 7 Beav 455 : 49 E R 1141 ; *Dobson* v. *Groves,* (1844) 6 Q B R 637 ; *Walker* v. *Frobisher,* (1801) 6 Ves Jun 70 : 31 E R 943 referred to.

A party is entitled to cross-examine a witness in respect of a statement made by him in a previous proceeding without such statement being produced

*A A O No. 411 of 1921. 7th September, 1923.

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or shown to him. It is only if it is intended to contradict him by such a statement that under S. 145 of the Evidence Act his attention has to be called to those parts of it which are to be used for the purpose of contradicting him.

Appeal against the order of the Court of the District Judge of Anantapur, in Interlocutory Application No. 95 of 1920 in O. S. No. 31 of 1912 on the file of the District Court of Bellary.

L. A. Govindaraghava Aiyar for appellant.

B. Somayya for respondent.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—This was an application by the fourth defendant for mesne profits on the extent of land in the enjoyment of the plaintiff between the date of the decree in the first Court and the decision of the appeal. The matter was referred by the District Judge to a Commissioner to ascertain the amount of mesne profits due. The Commissioner directed the plaintiff to adduce her evidence first, on the ground that she had been in possession of the property and was thus in the best position to state how much profit she had obtained. The plaintiff's pleader refused to open his case, upon which the petitioner's witnesses were examined and the case was closed. Meanwhile, the counter-petitioner applied to the District Court to direct the Commissioner to record her evidence. The District Judge in an order on the interlocutory application decided that the Commissioner was right and refused the counter-petitioner's request.

The questions now before us are : (1) Whether the District Judge was right in giving the petitioner mesne profits upon 15 acres 42 cents of wet land, and (2) Whether he was right in not allowing the appellant an opportunity to adduce her evidence. As regards the extent of the land, the plaintiff's pleader relies on an admission made by the fourth defendant in another suit, O. S. No. 393 of 1916, that she (plaintiff) was only in possession of 8 acres 47 cents and he argues that the petitioner is not entitled to get mesne profits on a larger extent than what he admitted that she was in possession of. The circumstances under which the statement was made in the other suit have not been proved. The Judge relied on the extent as given in the delivery warrant and I think he was right in doing so.

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On the second point, I am of opinion that the Commissioner and the District Judge were in error in requiring the plaintiff to open her case. O. 18, R. 1, Civil Procedure Code, which is applicable to miscellaneous proceedings through S. 141, lays down that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff. In a case like the present where the fourth defendant is the person claiming mesne profits, he is in the position of a plaintiff as it is his petition that is the foundation of the proceedings and, if he adduces no evidence at all, no mesne profits can be awarded to him. S. 2, cl. (12) defines mesne profits as those profits which a person in wrongful possession of such property actually received or might, with ordinary diligence, have received. The profit which a person actually received is a matter within the peculiar knowledge of that person and, under S. 106 of the Evidence Act, the burden of proving the amounts actually received will lie on the person who received them ; but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them. The cases cited for the respondent *Brojendro Coomar Roy* v. *Madhub Chunder Ghose* (1) and *Dinobundhoo Nundee* v. *Keshub Chunder Ghose* (2) do not go further than to show that it lies on the person who actually received mesne profits to show how much he received. These two cases are not authorities for saying that it is for the person in occupation to prove what mesne profits should be awarded, which is a very different thing. In *Krishna Mohan Basak* v. *Kunjo Behari Basak* (3) it was observed that there may be cases in which the defendants in a suit for mesne profits may properly be called upon to produce their accounts and to give information upon facts within their special knowledge, but that, under the provisions of S. 179, Civil Procedure Code of 1879, which corresponds to O. 18, R. 1, the right to begin was with the plaintiff and the appellant's contention that it was for the defendant to begin was not entitled to any consideration.

The counter-petitioner applied to the District Judge to be allowed to examine her witnesses and this application was refused. As the case cannot be satisfactorily disposed of without hearing the evidence on both sides, I think it is necessary that we should send the case back to the District Judge

1. (1882) I L R 8 C 343. 2. (1865) 3 W R (Mis) 25.
3. (1881) 9 C L R 1.

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and ask him to record such evidence as the counter-petitioner may produce on her side and such further evidence as the petitioner may adduce on the same points.

Another error into which the Commissioner has fallen which has been referred to in the course of argument is the fact that he obtained information from certain persons whose evidence was not recorded by him. The Judge considered that this information was admissible. I am of opinion that the Commissioner was entitled to base his report on his local inspection and also upon the crop experiment conducted by him, but that any evidence that he took should have been recorded in writing. O. 26, R. 10 requires that he should reduce to writing the evidence taken by him. Information given by witnesses which is not reduced to writing is not legal evidence upon which the Court can decide. If either of the parties desires to have the benefit of the statements of those persons from whom the Commissioner obtained information, they should now cite them as witnesses ; otherwise, the District Judge should come to a conclusion on the rest of the evidence before him without any reference to such unrecorded statements. The District Judge is directed to return his revised findings within three months. Ten days for objections.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—I agree and I wish to add a few words. The plaintiff filed a suit for the recovery of certain property and obtained judgment. In pursuance of it she took possession of 15 acres and 42 cents of wet land with which we are mainly concerned. In appeal the judgment was reversed and the fourth defendant now seeks restitution of mesne profits. I may note that the fourth defendant by way of restitution already obtained 15 acres of wet land from the plaintiff. There is no need to refer to the dry land claimed so far as this judgment is concerned. The first question that had to be decided by the lower Court was whether mesne profits were to be given in respect of 15 acres of wet land or merely in respect of 8 acres which the plaintiff said was the extent of the land she had taken possession of from the fourth defendant. The lower Court, having regard to the plaint, the decree, the execution proceedings and the delivery warrant, came to the conclusion that the plaintiff was accountable for mesne profits in respect of 15 acres of wet land. The matter was fully dealt with by the District Judge and it is sufficient to say that the lower Court rightly allowed mesne profits in respect of 15 acres and odd so far as the wet land is concerned.

The next question is, what is the proper amount of mesne profits? The District Judge referred the matter of the ascertainment of the mesne profits to a Commissioner. This is what the District Judge says in his preliminary order:— "Under O. 26, R. 9, Civil Procedure Code, I resolve to appoint a Commissioner to make a local investigation and ascertain the amount of mesne profits which may be awarded to the fourth defendant on the abovementioned extent of land comprised in the items specified in paragraph 2 *supra* after examining witnesses and receiving any documentary evidence which the parties may produce before him."

When the enquiry was taken up by the Commissioner, the plaintiff contended that the fourth defendant should begin and adduce evidence on the ground that the burden was upon him to make out what the mesne profits allowable to him were. The Commissioner ruled that the plaintiff was the party who was to begin, thus implying that the burden of proof was upon the plaintiff. The plaintiff's vakil declined to call evidence objecting to the ruling and allowed the fourth defendant to examine his witnesses. The latter's case was closed on 13th February, 1921, when the plaintiff apparently made an application to be allowed to examine her witnesses at that stage. The Commissioner refused the request. Thereupon on the 16th February, 1921, the plaintiff applied to the District Court to be allowed to examine her own witnesses and the District Judge decided that the ruling of the Commissioner was right and rejected the plaintiff's application. Before I deal with the objection that relates to this, I may advert to certain other matters that transpired before the Commissioner himself.

The plaintiff desired to cross-examine the fourth defendant with reference to a certain allegation made in the latter's written statement in another proceeding. The Commissioner disallowed the plaintiff's request and on application by the plaintiff to the District Judge, the order of the Commissioner was confirmed.

Exception is taken to the report of the Commissioner on another ground. Under the impression that he could gather information by instituting enquiries regarding the correct amount of mesne profits and act upon such information, he interviewed several ryots and others and collected their opinion and based his conclusions *inter alia* upon the information so obtained.

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Next it is said that the Commissioner conducted certain experiments. He had the crop harvested. He confined himself to two small plots of land, and, on the results obtained, he based his calculation in regard to the whole land. It has been argued before us that the Commissioner was wrong in adopting this procedure.

I shall deal shortly with these objections. In regard to the last objection it seems to be untenable. It has been pointed out that the two plots were selected out of the entire lands and it has not been shown that the yielding capacity of the other portions which are adjacent to the plots selected is different.

In regard to the objection that the Commissioner was wrong in refusing to allow the plaintiff to cross-examine the fourth defendant in respect of a statement made by the latter in a previous proceeding, the objection must be upheld. Under S. 145 of the Evidence Act a witness may be cross-examined as to previous statement made by him in writing without such writing being shown to him or being proved. Only if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Commissioner refused to allow cross-examination on the ground that the document which contained the previous statement was not produced. The plaintiff was entitled to cross-examine the fourth defendant in regard to his previous statement without showing the latter the document. Only if it became necessary to contradict the fourth defendant, his attention should be called to the writing. The Commissioner acted clearly wrongly in this respect. On another ground the Commissioner's order is sought to be justified. It is said that, when the preliminary order was passed, the Court refused to attach any weight to the fourth defendant's previous statement, and, for that reason, the Commissioner also was justified in refusing to allow questions to be asked in regard to it.

This position is entirely wrong. The Court when passing the preliminary order declined to make any inference from the previous statement as regards the extent of the land in the fourth defendant's possession. The writing was sought to be used before the Commissioner for altogether a different purpose, the purpose being to ascertain the probable yield.

The contention that the Commissioner was not justified in obtaining information in the absence of the parties must be

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upheld. The Court is not entitled to act on information received in the absence of the parties, nor can it base its judgment on its own knowledge of the facts. The law on this subject is well settled. Lord Langdale, M. R., observes in *Harvey* v. *Shelton* (4) : " In every case in which matters are litigated, you must attend to the representation made on both sides, and you must not, in the administration of justice, in whatever *forum*, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decision of the Judge, which means are not known to the other side."

To say that the Commissioner could have come to the same conclusion on the other material before him is no answer. If the case is brought within the general principle that the Judge's mind may, by a possibility, have been biassed, there is a sufficient objection. See *Dobson* v. *Groves* (5) and *Walker* v. *Frobisher* (6).

The only other point that remains to be dealt with has reference to the objection that the ruling of the Commissioner in regard to the right to begin is wrong. The District Judge expressed the opinion that the ruling was correct. The fourth defendant claims in this proceeding mesne profits from the plaintiff. S. 2, cl. 12 of the Civil Procedure Code defines mesne profits thus : " Mesne profits of property means those profits which the person in wrongful possession of such property actually received *or might with ordinary diligence have received therefrom.*"

It will be seen that mesne profits are not merely profits which a person in wrongful possession has actually received. The argument therefore that the amount of profits actually received is within the knowledge of the person in possession and that therefore the latter should in the first instance give evidence is clearly untenable. In a suit for mesne profits the burden is always held to be on the plaintiff to prove the amount. This is the recognised practice. The proceeding before us is really in the nature of a suit for mesne profits. No ground has been shown why this practice should be departed from. The Commissioner's ruling that the plaintiff should begin is tantamount to a decision that the burden of proof is upon the

4. (1844) 7 Beav 455 : 49 E R 1141. 5. (1844) 6 Q B R 637.
6. (1801) 6 Ves Jun 70 : 31 E R 943.

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plaintiff. From the nature of the controversy, what the parties were disputing about was not in regard to the right to begin but the duty to begin. I am of the opinion that the fourth defendant was bound to adduce evidence in the first instance regarding the amount of mesne profits. [See *Krishna Mohan Basak* v. *Kunjo Behari Basak* (3).]

I therefore hold that the Commissioner as well as the District Judge were wrong in regard to this matter.

Now that we have decided that the ruling is incorrect, what follows ? It has been contended on behalf of the fourth defendant that the plaintiff's vakil having refused to adduce evidence when he was called upon to do so, he should not be allowed an opportunity to examine his witnesses. This contention I am unable to understand. When the Commissioner gave a ruling, the plaintiff took a risk in refusing to accept it. But what is the extent of the risk that she took ? She took the risk of the ruling of the Commissioner being ultimately pronounced to be correct. If it should be held to be correct by the final tribunal, the plaintiff not having examined her witnesses when she ought to have done so she would of course be completely debarred from adducing any evidence whatsoever. But this is the only risk that the plaintiff took. Immediately the fourth defendant's case was closed, the plaintiff's vakil made an application that he should be allowed to let in evidence. The effect of our decision is that the plaintiff should give evidence only after the fourth defendant had closed his case. It therefore follows that the plaintiff should be allowed to examine her witnesses at the close of the fourth defendant's case.The following passage from Taylor on *Evidence,* Vol. I, p. 291, S. 388, has been relied upon by the fourth defendant:—

"The question respecting the right to begin is a matter of practice and regulation upon which the presiding Judge must exercise his discretion; and the Court will not interfere with his decision unless it be clearly proved, not only that the ruling on this point was manifestly wrong, but that it has occasioned substantial injustice."

This passage would certainly be of assistance to the fourth defendant, if the plaintiff accepting the ruling of the Commissioner had given evidence in the first instance. In that case the Court, although it came to the conclusion that the ruling was incorrect, would not ordinarily interfere with the final decision in the suit. But here the plaintiff did not accept the ruling

3. (1881) 9 C L R 1.

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but, instead of doing that she kept quiet but subsequently applied after more than a month had elapsed for a second order for delivery. When it was pointed out to her that her previous application failed because obstruction had been offered by a third party, that is the petitioner, her (decree-holder's) vakil himself asked that an order for symbolical delivery might be given to him and that he did not want an order for express and actual delivery. When this was the decree-holder's request, the warrant to the Amin to deliver actual possession seems to have been drawn up erroneously. The warrant was therefore illegal in this respect.

Again, when the warrant was taken out to be executed by the Amin, it was perfectly open to the petitioner, he being a person in possession of the property and not bound by the decree to have obstructed and such an obstruction could not be treated as an unlawful obstruction to the exercise of a lawful authority by a public servant. [See *In re, Appaswami Mudali* (1), *King-Emperor* v. *Gopalaswami* (2) and *Gahar Mahammed Sarkar* v. *Pitambar Das* (3).] I therefore hold that no offence under S. 186, Indian Penal Code, has been committed. The order under S. 476, Criminal Procedure Code, must therefore be quashed.

Before parting with this case, I must observe that the way in which the District Munsif disposed of it seems to be very unsatisfactory. He seems to have hurried through the case without granting the reasonable adjournment asked for by the petitioner apparently because he wished to dispose of the case himself before he might be transferred to some other place. It is said that he was then under orders of transfer, which was subsequently cancelled. An affidavit was filed before him by the petitioner and in the circumstances disclosed in that affidavit he should have taken greater care in the disposal of this case than he really did.

The Revision Petition is allowed and the order under S. 476, Criminal Procedure Code, is set aside.

T. S. V. *Petition allowed.*

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1. (1924) I L R 47 M 442 : 46 M L J 447.
2. (1902) I L R 25 M 729.
3. (1918) 22 C W N 814.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

A. N. Ramasami Pillai and others ... *Appellants** (*Defendants* 5 *to* 7 *and* 10)

v.

Narayanasami Pillai and others ... *Respondents* (2*nd plaintiff and defendants Nos.* 1, 3, 6, 9, 11 *and* 12).

Ramasami Pillai *v.* Narayanasami Pillai.

Civil Procedure Code, O. 41, *R.* 23 *and O.* 43, *R.* 1 (*u*)—*Preliminary point —Bar to trial of suit—Order of remand—Appealability—Mortgage—Prior and subsequent—Purchase of a portion of the hypotheca by prior mortgagee—Effect of, as against mortgagor and puisne mortgagee—Suit on mortgage against remaining items impleading puisne mortgagee—Decree—Subsequent suit by puisne mortgagee—Maintainabilty of.*

Where an appellate Court differing from the view of the first Court holds that the trial of a suit is not barred by reason of an earlier litigation between the parties and remands the suit for disposal on the merits, the order of the appellate Court falls within O. 41, R. 23, Civil Procedure Code, and is appealable. *Raman Nayar* v. *Krishnan Nambudripad,* 45 M 900 followed.

Where a prior mortgagee purchases in execution of a money decree a portion of the hypotheca, as between him and the mortgagor, a proportionate part of the mortgage debt is wiped out, the mortgage being split up as it were, and the mortgagee has to recover the balance of the mortgage money from the remaining portion of the hypotheca and the mortgagor personally. As against the mortgagor, he becomes the owner of the property purchased. But as between the prior and puisne mortgagees the result is not the same. The purchase by the former does not enable him to retain the property purchased as full owner as against the latter and throw the burden of the balance of the debt on the remaining portion of the hypotheca after deducting only a proportionate part of the debt. The first mortgagee cannot retain possession of the property purchased as against the second mortgagee unless he gives credit to the whole value of the property towards his mortgage and is willing to proceed against the remainder of the hypotheca only for the balance after deducting the whole value. Where the first mortgagee so gave credit and sued only for recovery of the balance from the remainder of the hypotheca impleading the puisne mortgagee as a party and obtained a decree for sale, it is not thereafter open to the puisne mortgagee to sue for redemption any of the properties comprised in the first mortgage.

Bisheshur Dial v. *Ram Sarup,* 22 A 284 followed.

Chinnu Pillai v. *Venkatasami Chettiar,* 40 M 77 ; *Sri Gopal* v. *Pirthi Singh,* 24 A 429 distinguished.

Narayana Rao v. *Venkayya,* (1918) M W N 902 not followed.

Appeal against the order of remand, dated 4th December, 1922, of the District Court of West Tanjore is A. S.

*A A O No. 76 of 1923. 9th October, 1924.

Ramasami Pillai v. Narayanasami Pillai.

No. 216 of 1921, preferred against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 119 of 1920 (originally O. S. No. 49 of 1917 of this Court).

K. Bhashyam Aiyangar and *K. Narasimha Aiyangar* for appellants.

K. Balasubramania Aiyar for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—This is an appeal against an order of remand. A preliminary objection is taken by the learned vakil for the respondents that no appeal lies as the order of remand was not made on account of the reversal of the Subordinate Judge's finding on a preliminary point. As will be seen from the statement of facts lower down, the question in the case on which the Courts below have differed is whether the trial of the suit (as between plaintiffs and the contesting defendants 4 to 9) is barred by the events in an earlier suit. Following the Full Bench decision in *Raman Nayar* v. *Krishnan Nambudripad* (1) we think this is a preliminary point and overrule the objection.

The facts are as follows : The defendants 1 to 3 were the owners of three sets of properties A, B and C. For convenience I will refer to the first two as property A-B. They created over all the three a first mortgage in favour of the 4th defendant (17—5—02) and a second mortgage in favour of plaintiff (22—5—02). The first mortgagee purchased the property A-B in execution of a Small Cause decree on 9th November, 1905, subject to the two mortgages. He then filed a suit (O. S. No. 42 of 1915) to recover the balance (after giving credit to a certain amount by reason of his purchase) by sale of property C. In that suit the second mortgagee was impleaded. The array of parties in both the suits is as follows :—

O. S. No. 42 of 1915.	*Present Suit O. S. No. 119 of 1920.*
1st mortgagee—Plff.	4th defendant.
Mortgagor—Defts. 1 to 3.	1 to 3 defendants.
2nd mortgagee—Deft. 4.	Plaintiff—
	5 to 8 defts. { Purchasers from 1st mortgagee of property A & B.
	9th deft. Do. C.

1. (1922) I L R 45 M 900 : 43 M L J 547 (F B).

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Ramesam, J

It will be convenient to pause here and to consider the effect of the purchase by the first mortgagee in execution of the Small Cause decree. As between him and the mortgagor, a proportionate part of the mortgage debt was wiped out, the mortgage becoming split up, as it were, and the mortgagee has to recover the balance from the mortgagor from the remaining property C and he has the right to retain property A-B as absolute owner. This was decided in *Bisheshur Dial* v. *Ram Sarup* (2) followed in the Full Bench decision in Appeal from O. S. No. 42 of 1915 itself (A. S. No. 190 of 1917).

But, as between the 1st mortgagee and the 2nd mortgagee the result is not the same. The purchase by the former of property A-B does not enable him to retain it as full owner as against the latter and throw the burden of the balance of the debt on property C after deducting only the proportionate part of the debt. The 1st mortgagee can insist on the 2nd mortgagee redeeming the former and, in default of redemption, the property will be sold free of both mortgages. The whole proceeds of the sale will then be credited towards the 1st mortgagee. Thus, it is obvious that the 1st mortgagee cannot retain possession of the property A-B unless he gives credit to the whole value of the property towards his mortgage and is willing to proceed against property C for only the balance after deducting the whole value. This is exactly what the 1st mortgagee did in his former suit (O. S. No. 42 of 1915). Strictly a suit against property C only is not maintainable [*Surjiram Marwari* v. *Barhamdeo Persad* (3)]. But by the offer to credit the whole value of property A-B, it was in substance a suit against all.

When all the mortgagees are known, all the other mortgagees ought to be parties to a mortgage suit. In the present case we are not concerned with a suit by a first mortgagee without making a second mortgagee party. The rights in such a case are discussed in *Chinnu Pillai* v. *Venkatasami Chettiar* (4). Nor are we concerned with suits by a second mortgagee with or without making the first mortgagee a party *Chinnu Pillai* v. *Venkatasami Chettiar* (4) ; *Surjiram Marwari* v. *Barhamdeo Persad* (3) explaining *Sri Gopal* v. *Pirthi Singh* (5). We have here a suit by the first mortgagee making the second mortgagee a party. In such a suit the second mortgagee has the right to redeem the first

2. (1900) I L R 22 A 284 (F B). 3. (1905) 1 C L J 337.
4. (1915) I L R 40 M 77 at 82 : 30 M L J 347.
5. (1902) I L R 24 A 429 (P C).

mortgagee. It is to give him such an opportunity that the first mortgagee made the second mortgagee a party in O. S No. 42 of 1915. If the second mortgagee paid off the whole debt of the first mortgagee, property A-B as well as C would be entirely available to the second mortgagee who would then stand in the position of the two mortgagees. For obvious reasons, he never made such an offer in O. S. No. 42 of 1915. The values of all the properties are insufficient to pay off the whole of the first mortgagee and yet leave a surplus available for the second mortgagee. In default of his claim to redeem, the only other legal course is to sell property A-B as well as property C free of the mortgages. If in such a sale property A-B realises a certain price, the proceeds will be credited towards the first mortgagee. The first mortgagee, plaintiff in O. S. No. 42 of 1915, instead of actually allowing the property to be sold, offered to credit the full price towards his mortgage. The result of such credit is exactly the same as if all the long-drawn-out proceedings in execution of a decree of Court took place. If, in making the credit, he made an under-estimate of its value, the second mortgagee could attack the estimate. The Courts found in the former case that the value of the property A-B was Rs. 4,950 and of property C was Rs. 2,639-4-0. The first mortgagee in his plaint gave credit for Rs. 3,750 *plus* Rs. 1,000 *plus* Rs. 269-5-6, *i. e.*, a total of Rs. 5,019-5-6, that is, somewhat slightly more than the value of property A-B and sued only for the balance. That is, the second mortgagee was placed in a position exactly the same as (or better than) if the property A-B was actually sold in Court-auction and the full sale proceeds credited towards the first mortgagee and only the balance was thrown on the property C which is the utmost that the second mortgagee could ever claim. It is thus seen that the second mortgagee had really no plea to raise in the former case. His plea that the value allowed for the property A-B was inadequate was found against. After the said finding, he had nothing to do except asking for a decree against any surplus on the sale of property C. Having nothing to do, he joined the mortgagor in raising the extravagant plea that, by reason of the first mortgagee's purchase in the Small Cause decree, the whole of the first mortgage was wiped out. This contention was rightly negatived by the Full Bench. The mortgagor being the only appellant before the High Court, this was the only

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point argued before the High Court and referred to a Full Bench. There was no question raised for the purpose of settling the rights between first and second mortgagees. The second mortgagee filed a Memorandum of Objections asking for executing the decree against the surplus. This was refused on the ground that he did not claim it in the Court below. Even if he wished to raise any question between himself and the first mortgagee, there could have been no other decision than that the full value of the property A-B should have been credited towards the first mortgagee if the first mortgagee wished to retain that property as absolute owner ; and on the findings this was the course taken by the first mortgagee. Thus the result of the findings of O. S. No. 42 of 1915 is that the first mortgagee retained the property A-B free of all encumbrances and the second mortgagee's only right was against any surplus after the sale of property C. It is impossible to understand how the second mortgagee (the present plaintiff) has any rights available against the property A-B. Mr. Balasubramania Aiyar contends that he can still redeem the first mortgage or sell the properties subject to the first mortgage exactly as if he was not a party to the former suit. This is a very extravagant and fallacious proposition. The reason why the second mortgagee's rights are not lost by reason of a decree for sale in a suit by a first mortgagee in which he was not a party is that he was not given an opportunity to exercise his right to redeem the first mortgagee (which undoubtedly existed) and such right cannot be destroyed by proceedings behind his back. But the whole reason disappears when he was a party to the first mortgagee's suit and had an opportunity to exercise his right of redemption. After such a suit, all his rights over the properties common to both mortgages, unless they have been expressly preserved, are extinguished and he can maintain a suit on his mortgage only in respect of items which are not comprised in the first mortgage and for personal relief against the mortgagor. I entirely agree with the remarks in *Chinnu Pillai* v. *Venkatasami Chettiar* (4) : "If the first mortgagee sues first making the second mortgagee a party, as he ought to, there cannot be a trial of a further action," *i. e.*, a further action in respect of properties common to both mortgages. This is all that the learned Judge meant. He could not have meant that there can be no further action against the

4. (1915) I L R 40 M 77 at 92 : 30 M L J 347

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mortgagor in respect of other items, or for personal remedies, or for the surplus of the proceeds of the common items. In this sense, that these reservations were not expressly stated though intended, the proposition is broadly stated as remarked in *Narayana Rao* v. *Venkayya* (6). In this last decision, the properties were privately sold after the first suit and the decree in the first mortgage was never carried out. It does not appear that the value realised by the private sale was reported to Court, that a surplus was or was not available for the second mortgagee. On these grounds, the decision may be distinguished. But the reasoning in the judgment is different and I dissent from it. In my opinion, the principles laid down in *Sri Gopal* v. *Pirthi Singh* (5) apply and bar a second mortgagee from pursuing for any remedy against the properties mortgaged in both the mortgages equally whether the second suit is one for sale or one for redemption. When the second mortgagee was a party to the first suit by the first mortgagee and failed to exercise his right of redemption, he can have no rights against such properties which pass away to the purchaser in execution of the first decree, free of both the mortgages. *A fortiori* when, instead of an actual Court sale, full credit is given for the value towards the first mortgage—the same result being attained as if they are sold. I am unable to agree with the observations in *Narayana Rao* v. *Venkayya* (6), though the decision is right on the facts and also in so far as it lays down that a suit against the mortgagor for reliefs not connected with the common item is maintainable. The effect of the first suit is not that a suit by the second mortgagee against the mortgagor is not maintainable but that he has no rights to pursue against the common mortgaged items.

The case *L. J. Mackintosh* v. *N. S. Watkins* (7) referred to by Mr. Balasubramania Aiyar has no bearing on the case before us. All that it lays down is that in the suit by a first mortgagee against mortgagor and second mortgagee, the mortgagor cannot be called upon to redeem the second mortgagee. So also *Vedavyasa Aiyar* v. *Madura Hindu Labha Nidhi Co., Ltd.* (8), which laid down that the second mortgagee cannot, in such a suit, execute the decree obtained by the first mortgagee containing a clause for payment of the surplus to the second

5. (1902) I L R 24 A 429 (P C). 6. (1918) M W N 902.
7. (1904) 1 C L J 31. 8. (1918) I L R 42 M 90 · 35 M L J 639.

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mortgagee, if the first mortgagee did not proceed to sell. I agree with this. Not until the sale is held and the properties pass to a purchaser free of the encumbrances can the second mortgagee's rights on the properties be extinguished. When the decree remained unexecuted, the rights remain as before the suit. The first mortgagee's suit in all such cases does not decide that the second mortgagee has no rights. It only provides for sale free of encumbrances, and on such a sale, the second mortgagee ceases to have any rights except against the surplus.

In the present case, it is true there is no actual sale, but the same result is attained by selling the properties to the first mortgagee for their full value and the value being credited towards his mortgage.

It is also clear that, by the application of the principle of *res judicata*, no injustice is done on the facts of this case, as the value of all the properties is not enough to pay off even the first mortgage.

I allow the appeal and restore the judgment of the Subordinate Judge with costs here and in the Lower Appellate Court to be paid by first respondent (second mortgagee) to the appellants.

Jackson, J.

Jackson, J. :—I agree and have nothing to add.

A. V. V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice,* MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

P. Veerappa Naidu ... *Petitioner* (Petitioner)*

v.

Avudayammal and others ... *Respondents (Respondents).*

F. B. — Veerappa Naidu v. Avudayammal.

Criminal Procedure Code, Ss. 145 to 148 and S. 439—Costs—Power of the High Court to award costs in revisions against possession proceedings.

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*Cr R C No. 937 of 1923 (Cr R P No. 754 of 1923)
and
Cr R C No. 66 of 1924 (Cr R P No. 57 of 1924). 16th October, 1924.

F. B.

Veerappa Naidu v Avudayammal.

The High Court has no power to award costs incurred before it on the hearing of a Criminal Revision Case against an order passed under Chapter XII of the Criminal Procedure Code.

Sankaralinga Mudaliar v. *Narayana Mudaliar,* I L R 45 M 913 followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Sivakasi, dated the 29th October, 1923, in Possession Case No. 1 of 1923.

C. A. Seshagiri Sastri for *K. Balasubramania Aiyar* for petitioner.

V. L. Ethiraj and *A. Srirangachariar* for respondents.

R. N. Aingar for *The Public Prosecutor* on behalf of the Crown.

The Court (Wallace, J.) made the following

Wallace, J.

ORDER :—The question has been raised in connection with this petition whether the High Court can grant costs to the successful party and to the Public Prosecutor in a matter coming up before it in revision from an order passed by a Magistrate in proceedings under Chapter XII of the Criminal Procedure Code. It must be conceded that there is no specific provision in the Code which allows the High Court to grant such costs and I am referred to the Full Bench ruling in *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (1) for the proposition that the High Court has no jurisdiction to grant costs in criminal cases except in those cases where the Code of Criminal Procedure makes express provision. In that ruling, however, it was pointed out that S. 148, one of the sections under Chapter XII of the Code, does provide for the award of costs ; so that the granting of costs in proceedings under Chapter XII was not under consideration by the Full Bench in that case. S. 148 lays down that, when passing his decision in the case, a Magistrate may direct costs to be paid. Mr. Ethiraj, in an ingenious argument, contended that the awarding of costs in such proceedings is an incidental order within the meaning of S. 423 (*d*) and that the High Court has the power of exercising it by force of S. 439, which empowers a High Court, in revision, to exercise any of the powers conferred on it by S. 423. I am clear that the High Court, in revision, could pass any order which the Magistrate himself could have passed : that

1. (1922) I L R 45 M 913 : 43 M L J 369 (F B).

F. B.

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is, the High Court could, in revision, direct the costs before the Magistrate himself to be paid by one party to another. But that is not the same thing as the High Court directing costs before it in revision to be paid by one party to another. As the learned Chief Justice has said in *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (1), "The whole machinery of revision is the creature of statute and has to be found within the four walls of the Criminal Procedure Code." It is obvious that Chapter XXXII of the Criminal Procedure Code does not specifically provide for costs incurred in the High Court by parties in Revision Petitions. I hesitate to hold that any exception was intended to be made in a case where the first Court was itself empowered to award costs, and that the power conferred on the first Court was intended to extend to the High Court also, and form thus an exception to the general rule that no costs are awardable in Criminal Revision Petitions.

I may refer to certain cases of this Court in which costs in the High Court have been awarded in Criminal Revision Cases, relating to orders under Chapter XII of the Criminal Procedure Code, one of which is a judgment of my own. These are Criminal Revision Cases Nos. 519 of 1916, 51 of 1922. 352 of 1922 and L. P. A. No. 2 of 1915. The two cases of 1922 are later than the Full Bench decision. In none of these cases has authority been quoted for the award of costs.

Mr. Ethiraj has argued further that the term "Magistrate" in S. 148 will include the High Court, and quotes the Privy Council Ruling in *Clarke* v. *Brajendra Kishore Roy Chowdhury* (2), an *obiter dictum* stating that, in the Criminal Procedure Code, the terms " Magistrate " and " Court " are convertible. The question there, however, was only whether the Magistrate in doing a certain act was acting as a Court or not. To hold that wherever the term " Magistrate " is used, the term " High Court " can be substituted is obviously an untenable proposition, which would *inter alia* extend the original criminal jurisdiction of the High Court throughout the whole Presidency. Where the Code means the High Court it uses the term " the High Court."

It appears to me as at present advised that the High Court has no power to award costs incurred before it on the hearing

1. (1922) I L R 45 M 913 : 43 M L J 369 (F B).
2. (1912) I L R 39 C 953 at 966 (P C).

F. B.

Veerappa Naidu v Avudayammal

of a Criminal Revision Petition against an order passed under Chapter XII of the Criminal Procedure Code ; but, as the practice of the Court is not uniform and the point as a question of jurisdiction has not been considered, I direct that the case be laid before the Chief Justice for reference to a Full Bench.

The Criminal Revision Case No. 66 of 1924 having been set down to be spoken to on Tuesday, the 30th September, 1924, as regards costs, the Court (Wallace, J.) ordered that the case be posted with Criminal Revision Case No. 937 of 1923 when it comes up before the Full Bench.

K. Balasubramania Aiyar for the petitioner :— Under the new Code of Criminal Procedure, proceedings under Chapter XII have been made revisable under Ss. 435 and 439. The general rule as to costs in the High Court in criminal revisions is laid down by the Full Bench decision in *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (1). There, their Lordships held that the High Court had no power under the Criminal Procedure Code to grant costs in revisions. This principle applies equally to revisions of orders under Chapter XII of the Code. S. 148 of the Code does not affect the question. That section gives power to the Magistrate to grant costs in the particular proceedings before him. The words " a proceeding under this Chapter " in that section cannot be made to include " Revisions in the High Court against orders under Chapter XII." This is made clear by the phrase " *The Court* may consider reasonable." Nor can " Magistrate " include the High Court as contended by the other side. If the High Court has no power to grant costs, otherwise, S. 148 cannot enable the High Court to grant costs indirectly.

Also the High Court cannot derive the power under S. 423, cl. (*d*). The order for costs cannot be said to be "a consequential or incidental order " within the meaning of that section. It is a separate order requiring separate considerations for passing it. Vide *Mehi Singh* v. *Mangal Khandu* (3). There is no power given in the Code to the High Court to grant costs and the specific sections like Ss. 433, cl. 2, 488, 526 (*a*), 344, etc., providing the power to grant costs show that the High Court has no such power and the maxim *expressio unius est exclusio alterius* applies.

1. (1922) I L R 45 M 913 : 43 M L J 369 (F B).
3. (1911) I L R 39 C 157 (F B).

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V. L. Ethiraj for respondents :— The High Court has power to grant costs. S. 148 enables the Magistrate to include the High Court costs. The Privy Council in *Clarke* v. *Brajendra Kishore Roy Chowdhury* (2) has held that the terms "Magistrate" and "Court" are convertible terms and "Court" includes the "High Court." Under S. 148, therefore, the High Court can grant costs. The High Court has also the power under S. 423, cl. (*d*). Vide *Ediga Thimmiah* v. *Emperor* (4).

R. N. Aingar for *Public Prosecutor* referred to S. 561-A which is a newly enacted section and it saves the inherent power of the High Court and the High Court could give costs under the inherent powers.

Spencer, O. C. J. :—" It cannot apply to costs at all. "

K. Balasubramania Aiyar not called for reply.

S. Rangachariar for petitioner in *Cr. R. C. No. 66 of* 1924.

A. Ramakrishna Aiyar for *L. S. Veeraraghava Aiyar* for respondents.

The Court expressed the following

OPINION :—We are agreed in thinking that the question whether the High Court, when exercising its powers of Criminal Revision, has inherent power to award costs to the successful party, has been settled by the decision of the Full Bench in *Sankaralingam Mudaliar* v. *Narayana Mudaliar* (1). Meanwhile the amendment of the Criminal Procedure Code has not made any difference, since the Legislature has not acted upon the suggestion thrown out by Coutts-Trotter, J., who sat upon the abovementioned Full Bench, that in order to check the activities of private prosecutors in revision proceedings the Court should be invested with power in proper cases to award costs. It is true that S. 561-A of the Code of Criminal Procedure which deals with the inherent power of the High Court is new. But as observed by the learned Chief Justice in *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (1), the Court cannot by invoking its inherent powers extend the powers given to it by Statute. Nor can the award of costs be treated as incidental or consequential to the disposal of the revision petition within the meaning of S. 423 (1) (*d*), for it does not necessarily follow from an order passed in revision [compare *Mehi Singh* v. *Mangal Khandu* (3)].

1. (1922) I L R 45 M 913 : 43 M L J 369 (F B).
2. (1912) I L R 39 C 953. 3. (1911) I L R 39 C 157 (F B).
4. (1924) 47 M L J 355.

F. B.

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Magistrates have power under S. 148 to direct by whom any costs incurred by parties in proceedings before them under Chapter XII are to be paid, but the costs referred to in this section are evidently the costs incurred in the magisterial proceedings. When the High Court sits in revision, it is not exercising the powers of a Magistrate under this Chapter and therefore the costs in the revision proceedings cannot be included under this head.

We consider that Wallace, J., who made this reference was right in holding that he had no power to make an order for costs in the two petitions which were before him and they will therefore be returned to him with our opinion for passing the necessary orders.

C. A. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Chidambara Velan ... *Appellant** *(Plaintiff)*

v.

Sangili Servai and others ... *Respondents (Defendants 5 and 6 and 1 to 4).*

Chidambara Velan v. Sangili Servai.

Madras Estates Land Act, S. 112—Notice of sale—Service of—Sufficiency of—Matters to be considered in determining—Endorsement on return if one of.

S. 112 of the Madras Estates Land Act no doubt does not require a statement in the endorsement of the notice returned that there was no adult male member in the family of the defaulter at his usual place of abode. But the Court is justified, when it has to decide whether or not there was a sufficient and proper notice under the section, in considering all questions arising from the way in whch the return was made. Where, therefore, there is no question that a copy of the notice was not served on the holder or his authorised agent, the Court can take into consideration the state of the endorsement in order to satisfy itself that the notice had been or had not been served in accordance with law.

Second appeal against the decree of the Court of the Second Additional Subordinate Judge of Madura in A. S. No. 143 of 1921, preferred against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 356 of 1920.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for appellant.

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*S A No. 1472 of 1922. 17th October, 1924.

Chidambara Velan v. Sangili Servai.

K. Rajah Aiyar and *N. K. Thirumalachariar* for respondents.

The Court delivered the following

JUDGMENT :—This is a suit to set aside a sale for arrears of rent held under the Madras Estates Land Act on the allegation that the sale was fraudulent. It is objected by Mr. B. Sitarama Rao for the appellant that, the Munsif having held that there was no fraud and the Subordinate Judge having eventually found against the plaintiff and dismissed his suit, there was no notice to the plaintiff that the various points to be detailed hereafter were going to be alleged against him. Now the written statement alleges in paragraph 8 various details of what are called fraud. It may, I think, be at once stated that there was no fraud in the ordinary acceptance of the term, but the word seems to have been used rather loosely and widely to cover the various irregularities alleged in the conduct of the sale. The District Munsif, as is clear from his judgment, allowed three matters to be agitated by the defence before him, namely, the issue of patta, the service of notice, and the proclamation of sale. With regard to the issue of patta there is no mention of it in the written statement and it is possible that the plaintiff may have been prejudiced by not having been put on notice of that, though it is stated that the question was put in cross-examination to his first witness, and, as I have said, there can be no doubt that it was allowed to be gone into by the District Munsif. Leaving aside this question, there are two further questions, *viz.*, defect in the notice of sale and in the proclamation of sale. These two allegations are specifically taken in details 2 and 3 of paragraph 8 of the written statement. Now, the Subordinate Judge found with regard to the first of these that there was no proper service of notice and that the provision of law as to notice had not been complied with, *i. e.*, S. 112 of the Estates Land Act (Act I of 1908). Mr. Sitarama Rao strongly urged before me the presumption that official acts must be taken to have been duly and sufficiently carried out and he pointed to the reason given by the Subordinate Judge in paragraph 10 of his judgment that there was no statement in the endorsement that there was no adult male member in the family. The learned vakil for the appellant points out, and points out quite rightly, that no such requirement is laid down in S. 112. But I think the Subordinate Judge was justified,

Chidambara Velan v. Sangili Servai.

when he had to decide whether or not there was a sufficient and proper notice under S. 112, in considering all questions arising from the way in which the return was made and it is clear that he was not satisfied that notice had been properly served on the holder of the estate. The section requires a copy of the notice to be served on the defaulter or to his authorised agent or on some adult male member of his family at his usual place of abode. There is no question that it was not served on the holder or his authorised agent and it seems to me that the Subordinate Judge could take into consideration the state of the endorsement in order to satisfy himself that the notice had been or had not been served in accordance with law. As the Subordinate Judge rightly says, the burden is of course on the plaintiff on this and on similar points, see *Irulappan Servai* v. *Veerappan* (1).

The second point found against the appellant by the Subordinate Judge is that the mode of proclamation was defective in that all that was proved was that there was proclamation by mere beat of tom tom and that, as the Subordinate Judge puts it, the contents of the proclamation were not proclaimed. As to the contents of the proclamation, he refers to the details contained in S. 117 (2) which must be specified in the order and the proclamation referred to in S. 117 (1). This has been found by the Subordinate Judge on the evidence to be defective and, as such, it is a finding of fact with which I cannot interfere.

Mr. Sitarama Rao has also contended that any irregularity of the sort arising in this appeal should be the subject of an application under S. 112 for the Collector to set aside the sale and that the Civil Courts have nothing to do with it. This, I think, is disposed of by the Full Bench ruling in *Rajah of Ramnad* v. *Venkatarama Aiyar* (2) where the Full Bench clearly lays down that a suit by a ryot who alleges that his property has been unlawfully sold can be investigated and tried by a Civil Court.

The two points, namely, service of notice and the proclamation, are sufficient to dispose of this Second Appeal, which is accordingly dismissed with costs.

A. S. V. *Appeal dismissed.*

1. (1921) 42 M L J 113. 2. (1922) I L R 45 M 890 : 43 M L J 264 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR

Ranga Dasan ... *Appellant** (*Plaintiff*)

v.

Latchuma Dasan and others ... *Respondents* (*Defendants*).

Ranga Dasan v. Latchuma Dasan.

Limitation Act, Art. 134—*Applicability—Temple trustee—Suit to recover possession of property of temple improperly sold by preceding trustee—Limitation—Starting point.*

Where the plaintiff, the pujari or trustee of certain temples, brought a suit, within two years after he had become the pujari, to recover possession of property of the temples improperly sold by his predecessor, *held,* that Art. 134 of the Limitation Act was inapplicable to such a case and that the suit was not barred.

Vidyavaruthi v. *Balusami Aiyar,* I L R 44 M 831 (P C) followed.

Second Appeal against the decree of the District Court of Coimbatore in A. S. No. 33 of 1921, preferred against the decree of the Court of the Principal District Munsif of Erode, in O. S. No. 713 of 1918.

T. M. Krishnaswami Aiyar for appellant.

A. Krishnaswami Aiyar and *N. P. Narasimha Aiyar* for 3rd respondent.

The Court delivered the following

JUDGMENT :—The lower appellate Court has found that the plaintiff is the Pujari or trustee of the suit temples. It has also been found that the suit property is property attached to the temples. The plaintiff's suit to recover possession has, however, been dismissed on the ground that it is barred by Art. 134 of the Limitation Act.

It has been held by the Privy Council in *Vidyavaruthi* v. *Balusami Aiyar* (1) that Art. 134 of the Limitation Act does not apply to a case of this kind. The respondents' learned vakil seeks to distinguish the present case from the decision in *Vidyavaruthi* v. *Balusami Aiyar* (1) by pointing out that in the Privy Council case the alienation by the trustee complained of was only a permanent lease and not a sale as in this case and reliance is placed upon the following passage in *Subbaiya Pandaram* v. *Mahomed Mustapha Marcayar* (2) in support of the distinction. The passage runs as follows :—" This is

*S A No. 1230 of 1921. 16th September, 1924.

1. (1921) I L R 44 M 831 : 41 M L J 346 (P C).
2. (1923) I L R 46 M 751 at 757 : 45 M L J 588 (P C).

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not, in fact, a transfer by the trustee himself for a valuable consideration, though there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself, but disregarding that Article, Art. 144 covers the exact case." It will be remembered that in *Subbaiya Pandaram* v. *Mahomed Mustapha Marcayar* (2), the trust property sought to be recovered was acquired by the purchaser under an execution sale and the question was whether the suit was barred under Art. 134 or Art. 144 of the Limitation Act. From the context in which it appears it seems to me that in the passage quoted their Lordships of the Privy Council were only meeting an argument that must have been raised at the bar with reference to Art. 134. They were only pointing out this, namely, that it might be that there is little difference between a transfer under an execution sale, *i. e.*, involuntary transfers, and a sale by the trustee himself, *i. e.*, voluntary transfers; but Art. 134 applies to transfers by the trustee himself for a valuable consideration, namely voluntary transfers. Then their Lordships proceed to discuss the applicability of Art. 144. That no such distinction as is now pointed out was present to their Lordships' mind is also clear from the fact that their Lordships in the course of the elaboration of the principle refer to cases of alienation by leases and mortgages. [Cf. *Mahomed* v. *Ganapathi*(3); *Jamal Saheb* v. *Murgaya Swami* (4); *Behari Lal* v. *Mohamad Muttaki*(5).] The decisions quoted by the learned vakil for the respondents, *Madhavarao Vaman* v. *Raghunath Venkatesh* (6), *Kuppuswami Mudaliar* v. *Samia Pillai* (7) and *Majavath Ali* v. *Mujafaralli* (8) do not refer to this distinction. I therefore think that the plaintiff's suit is not barred by limitation under Art. 134 of the Limitation Act. As it has been admittedly brought within two years after he became a pujari his suit is within time.

I therefore set aside the decree of the Courts below and give the plaintiff a decree as prayed for subject to his giving defendants 3 to 5 Rs. 1,700 for the value of improvements effected by them. The plaintiff will have his costs in all the Courts.

A. S. V. *Decree set aside.*

2. (1923) I L R 46 M 751 : 45 M L J 588 (P C).
3. (1889) I L R 13 M 277. 4. (1885) I L R 10 B 34.
5. (1898) I L R 20 A 482 (F B). 6. (1923) 47 M L J 248.
7. (1921) 42 M L J 1. 8. (1923) 45 M L J 791.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Maya Krishna Kone ... *Petitioner** (*Petitioner*)

v.

Kulasekhara Mudaliar ... *Respondent* (*Respondent.*)

Maya Krishna Kone v. Kulasekhara Mudaliar.

Madras Local Boards Act (XIV of 1920), S. 55 (4)—Disqualification for election—Member of Panchayat of village—If a Magistrate—Object of legislature.

A member of a village Panchayat exercising criminal jurisdiction under the Village Courts Act is not a Magistrate within the meaning of the Madras Local Boards Act and is not disqualified to be nominated under S. 55 (4), as he cannot be held to be an Honorary Magistrate within the meaning of that clause. The object of the disqualification in cl. 4 is that as there may frequently be cases in which the Taluq or Union Board is prosecuting, it would be opposed to all principles that a person who is really in the position of a Prosecutor should also be a Judge. It cannot be said that under the Village Courts Act, it is the body of persons alone that is constituted into a Criminal Court and vested with magisterial powers and that no individual member thereof is a Magistrate.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order dated the 11th December, 1922 of the District Court of Tinnevelly in O. P. No. 156 of 1922.

K. S. Sankara Aiyar for petitioner.

V. Rajagopala Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The petitioner in this case was duly nominated for election to a Union Board according to the rules relating thereto. The President of the Taluq Board rejected the nomination of the petitioner on the ground that he was a person disqualified to be nominated under the provisions of S. 55 of the Local Boards Act, Act XIV of 1920. Under cl. 4 of that section, no officer or servant holding office under the Act or an honorary Magistrate for the local area over which the Local Board concerned has jurisdiction is competent to be appointed as a member of such Local Board. The ground on which the President of the Taluq Board held the petitioner disqualified was that the petitioner was a member of the Panchayat of the village which exercised criminal jurisdiction within the same jurisdiction and that as for the services rendered by

*C. R. P. No. 704 of 1923. 24th October, 1924.

the petitioner as a member of the Panchayat in the administration of criminal justice he was not paid, he was an honorary Magistrate within the meaning of cl. 4 of S. 55 of the Local Boards Act.

The word "Magistrate" is defined by the Madras General Clauses Act (Act I of 1891), S. 3, cl. 18. It sets out that the term "Magistrate" shall mean any person exercising all or any of the powers of a Magistrate in the Code of Criminal Procedure, 1882." And when we come to the Criminal Procedure Code we find that there are only four classes of Magistrates, namely, the Presidency Magistrates, Magistrates of the First Class, Magistrates of the Second Class and Magistrates of the Third Class. S. 77 of the Village Courts Act, Madras Act II of 1920, provides that excepting S. 403 of the Code of Criminal Procedure nothing contained in the Criminal Procedure Code shall apply to Village Courts. From this it necessarily follows that a member of the Village Panchayat exercising criminal jurisdiction under S. 76 of the Village Courts Act is not a Magistrate within the meaning of the Local Boards Act. Having regard to the definition of the Magistrate in the General Clauses Act no person can be said to be exercising any powers of the Magistrate under the Code of Criminal Procedure to whom under the express terms of S. 77 of the Village Courts Act, the Code of Criminal Procedure is made inapplicable. Further there can be no doubt whatever that a member of a Village Panchayat derives his jurisdiction in criminal cases not from the Criminal Procedure Code but from the Village Courts Act.

It has been also attempted to be argued by the learned vakil for the petitioner that under the Village Courts Act it is a body of persons that is constituted into a Criminal Court and vested with magisterial powers and that therefore no individual member of that body could be said to be a Magistrate. I cannot possibly accede to such a contention. The object with which I take it that under the Local Boards Act an Honorary Magistrate is disqualified to be appointed as a member of the Taluq Board or the Union Board is that there may frequently be cases in which the Board is prosecuting and that it would be opposed to all the principles that a person who is really in the position of a prosecutor should also be a Judge.

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Having regard therefore to the principle underlying this disqualification I have no hesitation in rejecting this contention that a member of a body exercising the powers of a Magistrate is not a Magistrate. But having regard to the definition of the Magistrate I cannot hold that a member of the Village Panchayat is an Honorary Magistrate within the meaning of the Local Boards Act. I have therefore come to the conclusion that the Lower Court was clearly wrong in holding that the action of the President of the Taluq Board in rejecting the nomination of the petitioner was right.

I therefore allow the petition of the petitioner in the Lower Court and setting aside the declaration of the election of the respondent as a properly appointed member of the Union Board, direct that the nomination of the petitioner be accepted as right and that an election be held on that basis.

The respondent will pay the petitioner his costs both in this Court and in the Lower Court.

T. S. V. *Petition allowed.*

[APPELLATE JURISDICTION.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice,* AND MR. JUSTICE SRINIVASA AIYANGAR.

R. Sabapathy Rao and others ... *Appellants** (*Petitioners*)

v.

Sabapathy Press Co., Ltd. ... *Respondents* (*Respondents.*)

Sabapathy Rao v. Sabapathy Press Co., Ltd.

The Indian Companies Act (VII of 1913), S. 162 (vi)—Scope of—Company—Winding up—Just and equitable—What is—Lack of probity on the part of Managing Directors—Shareholders driven to suits for obtaining dividends—Effect of.

In a petition for winding up a Company, the reasons for a Court considering it to be just and equitable, under S. 162 (*vi*) of the Companies Act, that it should be wound up are not necessarily *ejusdem generis* with the reasons given in cls. 1 to 5 of the same section. *Loch* v. *John Blackwood, Ltd.,* (1924) A C 783. followed.

Where there is a want of confidence on the part of some of the shareholders in the conduct and management of a Company's affairs based on a lack of probity on the part of the Managing Directors in regard to the Company's business, it would be just and equitable under the section that it should be wound up. Where the evidence disclosed that the Managing Directors leased out factories to near relations who in their turn sub-let the same and made enormous profits thereby, and there were complaints by shareholders

*O S Appeal No. 19 of 1923. 5th November, 1924.

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regarding the distribution of balance sheets and the auditor's reports, and some of them were even driven to the necessity of filing suits to recover dividends, the Managing Directors should be called upon by the Court to explain the same and enter on their defence.

On appeal from the order dated 30th November, 1922 of the Hon'ble Mr. Justice Kumarasami Sastri passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 94 of 1922.

In the matter of the Indian Companies Act VII of 1913

and

In the matter of Sabapathy Press Co., Ltd., Bellary.

B. Somayya for appellants.

S. S. Vijiaraghavachariar for respondents.

The Court delivered the following

Spencer, Offg. C. J.

JUDGMENTS :—*The Officiating Chief Justice* :—This is an appeal in the matter of an application for the winding up of the Sabapathy Press Co., Ltd., Bellary, under S. 162 of the Indian Companies Act. The learned Judge who heard the petition admitted evidence both documentary and oral adduced by the petitioners, but he did not call upon the respondents to adduce any evidence, as he thought that no case had been made out for winding up the company. He made some observations to the effect that everything that had taken place in the company's proceedings might not be quite regular and proper and that the minority had some real grievances as proved by the evidence adduced by the petitioners. But he held that there was no ground made out under S. 162, cl. (6) for a winding up order, the other clauses of this section being not applicable to the case before him. Cl. 6 provides that a company may be wound up if the Court is of opinion that it is just and equitable that the company should be wound up. In a recent case before the Privy Council *Loch* v. *John Blackwood, Ltd.* (1), it was held that the reasons for a Court considering it to be just and equitable that a company should be wound up were not necessarily *ejusdem generis* with the reasons given in cls. 1 to 5. That was a case coming up from the Barbados which had several features resembling those of the case before us. There, as in the present case, it was alleged that the directors were able to exercise a dominant influence on the management

1. (1924) A C 783.

of the company and the managing director was able to outvote the minority of the shareholders and retain the profits of the business between the members of his family. Their Lordships held that, where there was a lack of confidence in the conduct and management of a company's affairs based on a lack of probity on the part of the Managing Directors not in respect of their private life affairs, but in regard to the company's business, then it would be just and equitable under the statute that the company should be wound up. In the present case, it was recognised by Mr. Justice Kumarasami Sastri, J., that Mr. Venkat Rao had a preponderating voice in the company by controlling a large number of shares. There are several other matters which seem to require an explanation at the hands of the respondents. Ramachander & Co. were appointed treasurers of the company and Mr. K. Ramachander himself, who is Mr. Venkat Rao's son and has several shares standing in his name, took leases of all the factories and disposed of them by sub-leases to other persons, thereby making a profit to himself which might have been secured to the company if the sub-leasing of the rights of lessees had been prohibited. Then R. 109 of the Articles of Association in Table A of the 1st Schedule of the Indian Companies Act requires that a copy of the balance sheet and the Director's report should be sent to every person entitled to receive notice seven days before the general meeting. There have been several complaints that the shareholders did not receive a copy of the balance sheet, nor was the auditor's report read at the general meeting or attached to the balance sheet, as required by S. 131 of the Act. Dividends have not been regularly paid, and the rate of dividend has been steadily diminishing which may be attributed to the factories not having been leased for larger amounts. It is true that in some cases where the shareholders have sued the company's officials for the recovery of dividends, the defence has been based upon some technical ground such as the want of succession certificate, failure to get the shares transferred in their names, or some similar reasons. But in one case, Ex. M series, it appears that the company raised an untenable defence that they were not responsible for the appropriation of dividends made by the former treasurers under an arrangement between those treasurers (Arumugam and Sambadham Mudaliar) and Ramachander and Co., their present Treasurers and they refused to pay the dividend on that plea. That

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plea was found to be untenable, and the shareholder got his decree and the company had to pay the costs, which fell indirectly upon the shareholders. In a well-regulated company dividends are paid regularly and punctually and it is almost unheard of that shareholders should be driven to bring suits against the company before they can get payment of their dividends. These and similar objections require further investigation. Neither Venkat Rao nor Ramachander have as yet gone into the witness-box and attempted to explain the ugly facts appearing against them. I am of opinion that the petitioners have proved sufficient facts to call upon the respondents to enter on their defence in the conduct of the affairs of the company is capable of an honest explanation. The order dismissing the petition is therefore set aside. Costs of this appeal will be costs in the cause and will follow the event.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree to the order proposed.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

P. M. Subramania Pillai ... *Appellant* in all (1st deft.)*

v.

Corera and others ... *Respondents in all (Plaintiffs 1 and 3 and Deft. No. 2).*

Subramania Pillai v. Corera.

Civil Procedure Code, O. 21, R. 2—Mortgage—Final decree—Agreement to pay enhanced interest—Enforceability in execution proceedings.

After the final decree in a mortgage suit the mortgagor agreed to pay the mortgagee decree-holder a higher rate of interest than that provided for in the decree in consideration of the latter giving an extension of time for payment. The agreement also provided for the enhanced rate of interest being recovered in execution. It was brought to the notice of the Court and recorded. Subsequently when the decree-holder sought to recover the enhanced rate of interest in execution the judgment-debtor objected on the ground that it was not open to the Court to alter or amend its decree even with the consent of parties and that the remedy of the decree-holder was by a separate suit. *Held,* that the judgment-debtor was estopped by his own conduct from raising the objection and that the decree-holder was entitled to realise the increased interest in execution.

Sadasiva Pillai v. Ramalinga Pillai, 2 I A 219 ; *Sheo Golam Lall v. Beni Prosad,* 5 C 27 relied on.

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*A A O Nos. 245 to 247 of 1924. 8th October, 1924.

Subramania Pillai v. Corera.

Appeal against the order dated 30th July, 1924 of the Court of the Subordinate Judge of Ramnad at Madura in E.P. No. 5 of 1924 and E. A. No. 129 of 1924 in O. S. No. 19 of 1920 of the Sub-Court, Tuticorin.

A. A. O. No. 247 *of* 1924.

Appeal against the order dated 25th July, 1924 of the Court of the Subordinate Judge of Tuticorin in E. A. No. 299 of 1924 in O. S. No. 19 of 1920.

A. A. O. No. 246 *of* 1924.

Appeal against the order dated 12th April, 1924 of the Subordinate Judge of Ramnad at Madura in E. P. No. 5 of 1924 in O. S. No. 19 of 1920 of the Sub-Court, Tuticorin.

The Advocate-General and *T. M. Ramaswami Aiyar* for appellant.

S. T. Srinivasagopalachari, S. Varadachariar and *M. Balasubramania Mudaliar* for respondents.

The Court delivered the following

JUDGMENT:—These are three Civil Miscellaneous Appeals, two being against the orders of the Subordinate Judge of Ramnad and one against the order of the Subordinate Judge of Tuticorin. Practically the same points arise in all the three appeals. The questions arise in execution of a mortgage decree. The preliminary decree was passed on the 17th July, 1920 by the Subordinate Judge of Tuticorin. It was a decree for a sum of Rs. 30,836 and odd and provides for the recovery of the amount by the sale of the properties in the first schedule up to a limit of Rs. 20,000 and of the properties in the second schedule up to a limit of Rs. 10,000. The balance, if any, was to be recovered from the first defendant personally. The final decree was passed on 21st March, 1922. In the interval between the two decrees, a sum of Rs. 10,000 was paid, and the final decree mentions this fact and provides for the usual decree for the balance. On the 10th November, 1922, an agreement was arrived at between the mortgagee-decreeholder and the first defendant by which the mortgagor agreed to pay a higher interest at the rate of Rs. 1-4-0 per hundred per mensem or 15 per cent per annum, in consideration of the mortgagee giving him time. It also recites the fact that the mortgagor applied on earlier occasions for extension of time and was granted. The agreement further provided for the enhanced

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rate being recovered in execution. This agreement was reported to the Subordinate Judge of Tuticorin and an application was made to record it. The petition was filed under O. 21, R. 2, and the Subordinate Judge passed an order accordingly, "Adjustment as prayed for." O. 21, R. 2 strictly does not apply. There is really no adjustment that has been reported to the Subordinate Judge. The agreement merely provides for postponement of the execution of the decree and for an enhanced rate of interest being recovered by the decree-holder. If the application was made within six months from the date of the decree, O. 20, R. 11 (2) would have been applicable to it; but if that provision of law was mentioned, probably then the application would have been held to be barred. Anyhow, no objection as to limitation was taken, and, by consent of the plaintiffs and the mortgagor, the order was passed. The second defendant, a co-mortgagee, objected to the record of the adjustment, but his objection was overruled. In February, 1924 the mortgagor began to object to the higher rate of interest. The decree having been transmitted for execution from Tuticorin to Ramnad, he took the objection both in the Ramnad Sub-Court and also in the Tuticorin Court. That is why we have got appeals from both Courts. The objection was disallowed by the Subordinate Judge.

The first point argued by the learned Advocate-General, who appeared for the appellant-mortgagor, is that the agreement by which the mortgagor bound himself to pay an enhanced rate of interest at 15 per cent per annum cannot be enforced in these execution proceedings. He contends that to allow the point to be taken in execution proceedings practically amounts to amending the decree. He relies on *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (1), where it was laid down by the Privy Council that a decree cannot be altered by a Court even with the consent of the parties, except in the modes recognised by law, viz., either by an application for the amendment of the decree to bring it in accordance with the judgment or by a review of the judgment or by an application under O. 20, R. 11 (2). This decision has been followed and recognised in a number of other decisions both in Madras and in the other High Courts. He argues that though the agreement itself may be binding, it should be enforced in a suit and not in execution. To this objection Mr. Varadachariar, who appeared for the respondent, replies

1. (1900) I L R 24 M 1.

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that the appellant is estopped from raising this point. He relies on *Sadasiva Pillai* v. *Ramalinga Pillai* (2). In that case, Sir James Colville, who delivered the judgment of the Judicial Committee, said: "But even if it did not, they think that upon the ordinary principles of estoppel the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree........The Court here had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani* v. *Attorney-General of Gibraltar* (3) in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiae.*" In that case there was no decree for subsequent mesne profits but the defendant had executed certain security bonds in which he had undertaken to account in respect thereof to the Court, and their Lordships said that the amount of subsequent mesne profits not provided for in the decree could be recovered in execution. This case was applied in *Sheo Golam Lall* v. *Beni Prosad* (4), *Lakshmana* v. *Sukiya Bai* (5), *Narayan* v. *Raoji* (6) and *Thakoor Dyal Singh* v. *Sarju Pershad Misser* (7) in which the facts are somewhat similar and *Subramania Chettiar* v. *Rajah of Ramnad* (8) where the principle is the same but facts were somewhat different. In *Venkatagiri Aiyar* v. *Sadagopachariar* (9) the agreement itself was void as it was not sanctioned by the Court and an agreement which had no legal existence could not be relied on for the purpose of raising an estoppel. There is therefore no scope in that case for applying this principle. Nor does the point appear to have been argued. In *Lodd Govindoss* v. *Ramadoss* (10) it does not appear that the facts are such as to give rise to an estoppel. Anyhow the point was not argued : and though these cases support the general principle that a decree cannot be altered by a Court, they are not authorities for not applying the principle in *Sadasiva Pillai* v. *Ramalinga Pillai* (2). It is argued for the appellants that in the case in *Sheo Golam Lall* v. *Beni Prosad* (4) and in other cases where the decision in

2. L R 2 I A 219. 3. L R 5 P C 516. 4. (1879) I L R 5 C 27.
5. (1884) I L R 7 M 400. 6. (1904) I L R 28 B 393.
7. (1892) I L R 20 C 22. 8. (1917) I L R 41 M 327 : 34 M L J 84.
9. (1900) 14 M L J 359. 10. (1915) M W N 225.

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Sadasiva Pillai v. *Ramalinga Pillai* (2) was applied, the Court itself passed an order acting upon the agreement between the parties ; and it was because of such an order that it was held that the party was estopped. We do not see any reason for thinking that the essential bases of the decision in *Sadasiva Pillai* v. *Ramalinga Pillai* (2) is an order of the Court and not the conduct of the opposite party. Following the above cases we must hold that the appellant is estopped from raising this objection in execution. In the language of the learned Judges (Ainslie and Broughton, JJ.) who decided *Sheo Golam Lall* v. *Beni Prosad* (4) the question whether such an agreement does or does not violate the rule that a Court cannot add to its decree becomes under the circumstances one which the Court will not enter into : the party who seeks to raise such question being estopped by his own conduct and the action of the Court taken thereunder.

The second point argued by the appellant is that the part-payment of Rs. 10,000 towards the decree should be proportionately allocated towards the Rs. 20,000 recoverable from the properties in the first schedule and the Rs. 10,000 recoverable from the properties in the second schedule. We do not see any reason why this should be done. Beyond the limit of Rs. 20,000 imposed upon the execution of the decree from the properties in the first schedule there is no other restriction. The decree is all one. It was for Rs. 30,000 and odd. After the part-payment, it still remains a single decree and the mortgagee is at liberty to recover the amount to any extent from any property he likes subject to the only restriction that he cannot realise more than Rs. 20,000 from the properties in the first schedule and more than Rs. 10,000 from the properties in the second schedule. This contention must be disallowed.

The third point mentioned by the appellant is that it should be made clear that any properties to be found in the premises of the ginning factory which is an item of property in the first schedule ought not to be included in the sale ; but we do not think that it is necessary to pass any directions in this respect. The mortgaged property was a ginning factory. If it had received any accretions in the interval they will also pass with the sale but properties which cannot be regarded as part of the ginning factory cannot pass with the sale. It

2. L R 2 I A 219. 4. (1879) I L R 5 C 27.

Subramania Pillai v. Corera.

is unnecessary to give any directions. The sale will take effect in the usual course and in the proper manner and will comprise only the mortgaged property with its accretions.

The last point argued by the appellant is that the sale proclamation should mention the value of the first item as Rs. 40,000. It would seem that this was the value at one time adopted by the decree-holder, but in the proclamation, as issued last, the value was mentioned as Rs. 25,000 and at the time no objection was made by the judgment-debtor. The respondent has no objection to the value being mentioned as Rs. 40,000 at the time of the sale, if it can be done ; but the appellant has waived the right to ask for a fresh proclamation if the appeal is dismissed. Stay of execution was granted only on that ground and to vary the proclamation now will be to grant him additional time. If the appellant so desires the Subordinate Judge may provide that the fact might be mentioned at the time of the sale by the officer who conducts the sale. Beyond this we do not think it necessary to give any directions.

The appeals substantially fail and C. M. A. Nos. 245 and 246 are dismissed with costs and C. M. A. No. 247 is dismissed but without costs.

A. V. V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Venkatasubbier ... *Appellant** (*Plaintiff*)

v.

Sundaramma and others ... *Respondents* (*Defendants*).

Venkatasubbier v. Sundaramma.

Hindu Law—Adoption—Rights of adopted son—Wife not taking part in the adoption—Effect of—Adopted son if inherits to her relations.

An adopted boy cannot inherit to the relations of the wife of the adoptive father who does not take part in adopting him, as in such a case she is not an adoptive mother. Where a widower makes an adoption, the adopted boy has no rights of inheritance to the properties or relations of the deceased wife of his adoptive father.

Second Appeal against the decree of the Court of the District Judge of Salem, in Appeal No. 207 of 1920, preferred against the decree of the District Munsif of Krishnagiri in O. S. No. 122 of 1919.

V. Govindarajachari for *A. Krishnaswami Aiyar* for appellant.

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*S. A No 318 of 1922. 30th September, 1924.

Venkata-subbier v. Sunda-ramma.

C. V. Ananthakrishna Aiyar for respondents.

The Court delivered the following .

JUDGMENT :—The plaintiff is the son of a step-sister of one Narasimha Aiyar. The first defendant is the widow of Narasimha Aiyar. Defendants Nos. 3 and 4 are the sons of another step-sister of Narasimha Aiyar. Plaintiff's suit is for a declaration that the alienation made by the first defendant in favour of the second defendant is not binding upon the plaintiff and defendants Nos. 3 and 4 as they are the reversioners to the estate of Narasimha Aiyar(?). Defendants Nos. 1 and 2 pleaded that the plaintiff and defendants Nos. 3 and 4 were not the nearest reversioners and that one Subbu Narayana Aiyar, the adopted son of(Venkatagiri Aiyar ?)the husband of Venkachi Ammal, the sister of Narasimha Aiyar, was the nearest reversioner to him.

The District Munsif found that the alienation was not for purposes which could bind the reversioners and dismissed the suit on the ground that Subbu Narayana Aiyar was the nearest reversioner and not the plaintiff.

The plaintiff's appeal to the District Court was dismissed on the ground that he was not the nearest reversioner. The plaintiff has preferred this appeal.

It is argued for the appellant that Subbu Narayana Aiyar could not inherit to the relations of Venkachi Ammal, the wife (sister ?)of Narasimha Aiyar. It is admitted that Venkachi Ammal died before Narasimha Aiyar (Venkatagiri Aiyar ?) adopted Subbu Narayana Aiyar. The question is whether an adopted son can inherit to the relations of a wife of the adoptive father. The contention of the vakil for the appellant is that an adopted son can inherit to the relations of the receiving mother ; only in other words an adopted son can inherit only to the wife of the adoptive father who joins in the ceremony of adoption.

It is well settled that if a man has two wives and makes one of the wives take part in adopting a boy, the wife so taking part in the adoption becomes the adoptive mother and the other wife is a step-mother. This point was settled in *Annapurni Nachiar* v. *Collector of Tinnevelly* (1) which was

[*Note* :—Venkachi Ammal was the sister of Narasimha Aiyar, and the wife of Venkatagiri Aiyar, and Venkatagiri Aiyar remained a widower and adopted Subbu Narayana Aiyar after Venkachi Ammal's death. In the judgment there seems to be a mistake as regards these names.—*Rep.*]

1. (1895) I L R 18 M 277 : 5 M L J 121.

Venkatasubbier v. Sundaramma.

affirmed on appeal by the Privy Council in *Annapurni Nachiar* v. *Forbes* (2). The principle of these decisions is that it is open to the husband to select any one of the wives to take part in the adoption. The wife, so selected by him, is termed the receiving mother and, for all practical purposes, becomes the mother and the adopted son inherits to her relations as a son born of her womb. [*Uma Sunker Moitro* v. *Kali Komul Mozumdar* (3), *Kali Komul Mozumdar* v. *Uma Sunker Moitro* (4) and *Padmakumari Debi Chowdhrani* v. *Court of Wards* (5).]

A widow can make a valid adoption : *Nagappa Udapa* v. *Subba Sastry* (6) and *N. Chandrasekharudu* v. *Bramhanna* (7).

In the latter case, the learned Judges were of opinion that an unmarried man could make a valid adoption. The principle of the Hindu Law is that an adoption is made to the man for a man can make an adoption not only without the consent of the wife but also in spite of her protest. The wife has no voice in the matter and she can be associated with the husband only if he desires her to do so. When a widow makes an adoption, under a power given by the husband, she makes the adoption only to the husband and not to herself. Where a husband does not associate any of his wives in the act of adoption, can it be said that the wives of the adopter become his mothers ? A man can ask only one of his wives to take part in the adoption. In delivering the judgment of their Lordships of the Privy Council in *Narasimha* v. *Parthasarathy* (8) Lord Moulton observed :—

> "Only one wife can receive a child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of law the same position as a natural mother to such an extent that her parents become legally the maternal grand-parents of the child."

Where a wife does not take part in the adoption by the husband, she becomes a step-mother if another wife takes part in the adoption.

The contention on behalf of the respondent is that in this case the adopter had only one wife who was dead at

2. (1900) I L R 23 M 1 : 9 M L J 209 (P C).
3. (1881) I L R 6 C 256.
4. (1884) I L R 10 C 232 (P C).
5. (1882) I L R 8 C 302 (P C).
6. (1865) 2 M H C R 367.
7. (1869) 4 M H C R 270.
8. (1914) I L R 37 M 199 at 220 : 26 M L J 411 (P C).

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the time of the adoption and that according to the Hindu Law it is the *patni* that takes part in all religious ceremonies and she being the only wife whom the adopter had it must be considered that she was the mother of the adopted son. It is further argued that the adopted son becomes affiliated to the adopter and his wife, and therefore he must be treated as a son born to the wife.

The question is whether a wife, who does not or cannot take part in the adoption, can become the mother of the boy in the same sense as the wife who receives the boy in adoption and who is termed the receiving mother. There is no direct authority on the point but a text in *Dattaka Mimamsa* is relied upon for the contention that it is really the receiving mother that becomes the mother of the adopted boy in the full sense of the term so as to enable the adopted boy to inherit to his adoptive mother's relations. The text is in Chapter VI, verse 50 :—

"The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest ; for the rule regarding the paternal is equally applicable to the maternal grandsires of adopted sons."

This shows that the relations of the adoptive mother only are the maternal relations of the adopted son. If a wife of the man who makes an adoption does not join in the adoption, she cannot become the receiving mother or adoptive mother. Relying upon this text Golabchandra Sarkar Sastri in his work on *The Hindu Law of Adoption* is of opinion that it is the adopted son that can inherit to the relations of his adopted mother only. He observes at page 215 :—

"In order that the affiliation may be complete, it appears to be necessary that the wife also should join in adopting a son."

At page 227 he remarks :—

"To be a son to her for legal and religious purposes, it appears to be necessary that she should join in the ceremony of accepting the boy adopted by the husband, for in the absence of her acceptance she cannot be called 'adoptive mother'."

At page 419 (*e*) he says :—

"But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee her legal son. Even when a man has only one wife, and the man alone adopts, and the wife does not join in the act of adoption or concur in it, the legal relation of mother and son cannot arise between them. There can be no actual and legal relation of mother and son between the wife taking no part in the adoption, and the husband's adopted son any more than between a wife and the husband's begotten son by her co-wife."

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It is clear that the wife in order to have the real relatic of mother and son should join the husband in making tl adoption. If she does not she stands only in the positic of a step-mother. As the adoption is made only to tl husband and as a bachelor or widower can adopt it is bı reasonable that the wife, in order to have the legal relatic of mother and son, should join in the act of adoption.] an unmarried man makes an adoption and afterwards marri two wives, can it be said that both the wives are adoptiv mothers ?

It is contended that where there are two or more wive the wife or wives who do not take part in the adoption becom step-mothers, but where there is only one wife, she become the adoptive mother whether she joins in the act of adoptio or not. It is difficult to accept this argument, for it woul lead to this conclusion that if a man having more than on wife makes an adoption without making any one of the wive take part in the adoption, all would become adoptive mothers This is opposed to the observations of their Lordships of th Privy Council in *Narasimha* v. *Parthasarathy* (8) :—

"To hold that a child could bear such a relationship to more tha one mother would be entirely contrary to settled law and would produce in extricable confusion in the law of inheritance."

Mr. Ananthakrishna Aiyar lays stress on the text o *Nanda Pandithar* in *Dattaka Mimamsa,* Part I, verse 22 :—

"In consequence of the superiority of the husband by his mere ac of adoption the affiliation of the adopted, as son of the wife, is complete in th same manner as her property in any other thing accepted by the husband."

Mr. Mayne in his book notes this text as authority foı the position that an adoptive mother has the same relation tc the adopted boy as a natural mother would (vide *Mayne*, para. 166). He does not express any opinion as to the relationship of the only wife of the adopter who does not take part in the adoption by the husband. If it is open to a husband to select any of his wives to join in adopting a boy, it is also open to him to make an adoption without joining any of them in the act of adoption. The cases (*Nagendas Bhagwandas* v. *Bachoo Hurkissondas* (9) and *Anandi* v. *Hari Suba* (10) which lay down that an adopted son is for all purposes the son of the adoptive mother, do not help to solve this question. An argument was advanced that as the adopted boy loses his right in the natural family to his mother's relations, he must

8. (1914) I L R 37 M 199 at 222 : 26 M L J 411 (P C).
9. (1916) I L R 40 B 270 : 30 M L J 193 (P C). 10. (1909) I L R 33 B 404.

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be held to acquire such rights in the adopter's family. This argument overlooks the fact that an unmarried man, a bachelor, could make adoption, in which case the boy can have no adoptive mother at all. The question is not what he gains or loses. The adoption being only to a man the relationship of the adopter to the adopted boy is irrespective of there being an adoptive mother.

In this case, the wife was dead at the time of the adoption. The adoption being after death, it cannot be said by any fiction that she took part in the adoption. The argument that she was a *patni* and therefore she must be held to be the mother, is, I think, not a satisfactory argument. Supposing that Narasimha Aiyàr [Venkatagiri Aiyar ?] had two wives, who were dead at the time of the adoption, could it be said that both the deceased wives became the adoptive mothers when the adoption was made? Mr. Ananthakrishna Aiyar remarked that it was unnecessary to speculate upon matters not actually before the Court for decision. But in considering whether a principle is sound or not we must see what the logical consequences of the principle would be. The case would be different if there is express authority for the position, in which case, the reasonableness or otherwise of the authority need not be considered. But in this case, there is an absence of authority except the text of *Nanda Pandithar* in *Dattaka Mimamsa* already referred to. I think the opinion of a Sanskrit scholar like Golabchandar Sarkar Sastri is entitled to considerable weight. Apàrt from his view, I think, considering the principle of the various decisions on the point and especially the decision in *Annapurni Nachiar* v. *Collector of Tinnevelly* (1) and *Annapurni Nachiar* v. *Forbes* (2) I hold that an adopted boy cannot inherit to the relations of the wife of the adoptive father, who does not take part in adopting him or, in other words, he can only inherit to the adoptive mother's relations and not to the wife of the adoptive father who does not take part in the adoption.

I allow the appeal. Inasmuch as the District Court has disposed of the appeal in its finding on issue 1, I remand the appeal to the District Court for disposal after recording findings on the remaining issues. Costs will abide the result. Court fee in this Court to be refunded.

T. S. V. *Appeal allowed.*

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1. (1895) I L R 18 M 277: 5 M L J 121.
2. (1900) I L R 23 M 1 : 9 M L J 209 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

R. Krishnaswami Pillai ... *Petitioner** (*Accused*).

Krishnaswami Pillai, *In re.*

*Madras Local Boards Act (XIV of 1920), Ss. 166 and 212—Plying motor car without license—Prosecution for—President's refusal of license—*Bona fides *—Plea—If valid.*

In a prosecution for an offence under S. 166 (1) of the Madras Local Boards Act for having plied a motor-car without license, the accused in order to escape punishment must show that he had a license given by the President or that he comes under S. 212 (11). It is not a valid plea in defence that the President refused the license improperly as a result of personal ill-feeling and malice.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the Ramnad Division at Madura in Criminal Appeal No. 30 of 1923, preferred against the judgment of the Court of the Sub-divisional Magistrate of Ramnad in C. C. No. 75 of 1923.

Dr. S. Swaminadhan and *M. C. Sridharan* for petitioner.

The *Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER :—In this case the accused has been convicted of having contravened S. 166, Cl. 1, of the Local Boards Act, 1920, by having plied his motor cars without obtaining a license from Sattur to Srivilliputhur. The section says : " No person shall, on any public road in a district, ply any motor vehicle for hire, or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a license obtained from the President of the District Board." On the evidence it is quite clear that the accused did ply his motor cars in contravention of that section. Sch. VIII prescribes the penalty for plying motor cars for hire on a public road without license, the maximum fine being Rs. 200.

It is argued before me for the accused that, though he had no license given to him, as the President of the District Board refused the license when he applied for one, the action of the President should be treated as a nullity as he did not exercise the power vested in him *bona fide* but was actuated by personal ill-feeling and malice against him, and the case

*Cr R C No. 153 of 1924
(Cr R P No. 136 of 1924). 6th November, 1924.

Krishnaswami Pillai. *In re.*

should be treated as a case falling under S. 212, Cl. 11, in which a proper order had not been passed on his application for license within 30 days and communicated to him and the application should therefore be deemed to have been allowed for the year. I am unable to accept this contention. The President has given his reasons for his refusal as required by S. 212, Cl. (4). Even assuming for one moment that the reasons stated for refusing the license in this case were not *bona fide* reasons and that the President was actuated by some ulterior motive in refusing it, I consider that that plea will not suffice to exculpate the accused from the penalty prescribed in the Act for plying his cars without a license. I must not be understood as holding that the President acted with any ulterior motive ; but, assuming for argument's sake that he did so, I do not think that his order can be regarded as an absolute nullity as is argued and the case considered as one in which no order has been passed. It may be that the accused can claim damages against the President if he is able to establish that the President exercised his powers under S. 212 not *bona fide* but with malice on account of personal ill-feeling against him. That question will have to be considered when a proper case is brought, but, in this prosecution, the accused, in order to escape punishment, must show that he had a license given by the President of the District Board or he comes under Cl. 11 of S. 212. He clearly does not come under that clause as an order on his application for license was made and communicated to him. We are not concerned at present with the question whether that order was properly passed or not : we have only to see if the provisions of law have been complied with. It is true Cl. 4 of S. 212 requires the grounds to be stated on which the order of the President is passed ; but the grounds have been stated by the President in his order. As held by the Bombay High Court* in a similar case arising under the City of Bombay Municipal Act the fact that the person authorised to grant or refuse the license did not exercise his discretion reasonably in refusing to grant the license is not one that could afford an answer to a charge that the accused has done something for which a license was necessary and for which he had no license. No authority has been brought to my notice to the contrary. I am therefore prepared to follow the view taken by the Bombay High

*See *Emperor* v. *Narandas Karsandas,* (1920) I L R 45 B 1076.

Krishna-swami Pillai, *In re.*

Court, and I hold that the conviction is correct. As the Magistrate remarks, it would have been sufficient to inflict a nominal punishment for the offence. But, as the accused himself asked for a fine of Rs. 51 to enable him to appeal, and he got the benefit of an appeal, I am not prepared to reduce his fine as Dr. Swaminadhan asks me to do. The conviction and sentence are confirmed and the Criminal Revision Petition is dismissed.

T. S. V. *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE SRINIVASA AIYANGAR.

R. Arunachala Naidu ... *Petitioner** (*Petitioner in C. M. P. Nos.* 2962 *and* 2964 *of* 1924 *and respondent in Appeals Nos.* 5 *and* 6 *of* 1921 *on the file of the High Court—Defendant*)

v.

Messrs. S. R. Balakrishna & Co., Kallai, Calicut ... *Respondents* (*Respondents in do. and appellants in do.—Plaintiffs*).

Arunachala Naidu *v.* Balakrishna & Co.

Civil Procedure Code, O. 45, *R.* 7, *proviso* 1—*Security—Immoveable property—Order directing acceptance—When can be made—Granting the certificate—What is—If refers to order of Court or issue of document.*

An application that immoveable property may be directed to be received as security for costs under O. 45 R. 7 in lieu of cash or Government Securities should be made at or before the time of making an order granting a certificate under O. 45 R. 3. The expression "granting of the certificate" in the provision refers to the order of Court and not the actual issue of a document called the certificate. The scope of the rule and its provisos considered. *Radha Krishna Das* v. *Rai Krishnachand,* I L R 23 All 415 (P C) and *Radhakrishna Aiyar* v. *Swaminadha Aiyar,* I L R 44 M 293 (P C) referred to.

Per Srinivasa Aiyangar, J.—Where the construction of a rule is clear, a Court of law has no right to get behind the rule by any inquiry into the reason of the rule.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing that the petitioner herein may be exempted from furnishing security in cash or Government Security and

*C. M. P. No. 3376 of 1924. 22nd October, 1924.

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that he may be permitted to offer immoveable property as security for the costs of the respondents in C. M. P. Nos. 2962 and 2964 of 1924 on the file of the High Court—for leave to appeal to His Majesty in Council against the decrees of the High Court in A. S. Nos. 5 and 6 of 1921 preferred against the decrees of the Court of the Subordinate Judge of South Malabar, Calicut, in O. S. Nos. 27 and 28 of 1919 respectively (the Privy Council Appeals having been consolidated as per order of this Court, dated 29th September, 1924 and made on C. M. P. No. 2966 of 1924.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for petitioner.

C. V. Ananthakrishna Aiyar for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—The petitioner applied for leave to appeal to His Majesty in Council and on the 29th September, 1924, the Court granted a certificate under the first part of R. 3 (1) of O. 45, Civil Procedure Code. The order granting leave concluded thus :—

"We therefore certify that as regards amount or value and nature, the case fulfils the requirements of S. 110."

On the 7th of October, 1924, the petitioner made the present application under the first proviso to R. 7 of O. 45, Civil Procedure Code, for being permitted to offer immoveable property as security in the place of cash or Government Bonds.

Proviso 1 *runs thus* :—

"Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished."

Under this proviso such an application can be made only at or before the time of making an order granting the certificate under R. 7 (1). But it was contended on behalf of the petitioner that R. 7 (1) refers not to the granting of a certificate but to the actual issue of the document called the certificate. The Court directs its mind judicially to the question when it makes an order for the grant of the certificate but if the argument which was advanced before us is correct, there is no provision relating to the passing of such an order. It is impossible to believe that the legislature has enacted seve-

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ral rules dealing with a subsidiary matter—the issue of a formal certificate and has omitted to provide for what is really a matter of great importance, the making of an order. The question is not whether there may not be an instrument called a certificate as distinguished from the order granting a certificate. A formal document called a certificate may be issued drawn up in conformity with the order made by the Court. But the Court applies its mind judicially to the matter when it makes the order granting the certificate. The necessary words may with greater formality be set forth in the instrument of certificate although such words are not present in the order itself. In this sense, there may be some distinction between the order granting the certificate and the formal certificate issued in pursuance of the order. But the real question is, what is it that is provided for in these various rules ? Is it the order granting the certificate or is it the formal issue of the instrument of certificate ? R. 3 provides that the petition for appeal should state the grounds of appeal and pray for a certificate that either as regards amount or value and nature the case fulfils the requirements of S. 110 or that it is otherwise [that is under S. 109, sub-section (*c*)] a fit case for appeal to His Majesty in Council. What is the certificate that is contemplated here ? Surely, it cannot be said that it is not a judicial order certifying that the necessary requirements exist or the case is otherwise a fit one for appeal. How can it be contended that a formal certificate can come into existence without an order of the Court ? R. 6 says, when such certificate is refused the petition shall be dismissed. When is the petition dismissed ? It is when the Court refuses to make the required order. If the contention pressed upon us is accepted, this rule becomes meaningless. Then R. 7 provides that when the certificate is granted the applicant shall do certain things. The word " granted " in R. 7 is the opposite of the word " refused " in R. 6. The scope of O. 45 is to provide for passing a judicial order granting a certificate or refusing a certificate. The granting of a certificate is treated as equivalent to allowing the petition and the refusal of a certificate, as equivalent to dismissing the petition. The scheme as well as the scope of O. 45 forbid us from upholding the contention of the petitioner's learned vakil. *Radhakrishen* v. *Roykishen* (1), which was relied on does not in the least support

1. L R 28 I A 182.

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Venkatasubba Rao, J.

this curious contention. When there appeared to be some inconsistency between the order and the certificate, their Lordships considered themselves bound to act upon the latter as being the more formal document, in the same way as Courts give effect to the terms of the decree as distinguished from the operative part of the judgment when there is conflict between a judgment and a decree. That it could not have been the intention of the Judicial Committee to ignore or disregard the order is apparent from their later decision in *Radhakrishna Aiyar* v. *Sundaraswami Aiyar* (2) where contrasting the order with the certificate which followed it, they referred to the former as the order embracing the *actual* certificate.

The object of the legislature in enacting the proviso in question is that the matter should be disposed of expeditiously. If the Court merely gives leave to appeal and says nothing more, the appellant is bound in the ordinary course to furnish security in cash or Government bonds. If, however, the appellant is desirous of furnishing a different kind of security, he must apply for a special order to that effect and obtain it simultaneously with the order granting the certificate. This ensures that subsequent to the granting of leave to appeal, no further time is taken up by another application being made. Proviso 2 to R. 7 aims also at the same result. It runs thus :—

"Provided further that no adjournment shall be granted to an opposite party to contest the nature of such security."

"Adjournment" referred to in this is the adjournment of the petition for the grant of a certificate. The word 'petition' is used in Rr. 2, 3, 5 and 7 and the petition that is throughout referred to is the petition for the grant of a certificate. R. 7 refers to the person applying by petition as 'applicant' and in the two provisos to R. 7 the words 'opposite party' are used to denote the person opposing the petition. The second proviso thus shows that it is only one hearing that is contemplated and that if a different form of security is to be permitted it is to be done at the time of the granting of the certificate. For these reasons I hold that the application before us is clearly incompetent and should be rejected. As my learned brother is of the opinion that the applicant should not be made to pay costs, the application will be dismissed without any order as to costs.

2. (1922) I L R 45 M 475 · 43 M L J 323 (P C).

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Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—The point that has been argued in connection with this application is somewhat subtle and not altogether free from difficulty. The present petitioner before us applied for leave to appeal to His Majesty in Council. From the judgment and decree of this Court in Regular Appeals Nos. 5 and 6 of 1921 and by order dated the 29th day of September, 1924 we granted leave and the order made by us granting such leave contained the necessary certificate as required by Ss. 109 and 110 of the Civil Procedure Code. No application was made to us at or before the time of our making the said order under the first proviso R. 7 of O. 45 of the Civil Procedure Code for leave to the petitioner to furnish instead of cash security the security of immoveable property. The present application for that purpose has been made only on the 7th of October, 1924. I have no doubt that the omission to apply for such an order at the time when leave was granted to the petitioner to appeal to His Majesty in Council was entirely due to the circumstance that the provisos in R. 7 of O. 45 of the Civil Procedure Code and the other amendments carried out in the said rule by Imperial Act XXVI of 1920 were overlooked as they do not appear to have been incorporated in the editions of the Code of Civil Procedure brought out even after 1920. In such a case therefore where the omission to apply for the relief was entirely due to mistake of that nature, we should have been disposed to consider the application if under the provisions of the law we were entitled to do so. The application has been opposed on behalf of the respondent on the ground that under the express terms of the proviso to R. 7 the Court has jurisdiction to make an order changing the form of the security to be furnished only at the time of granting the certificate. There is no question here of any extension of time limited for making any application. No doubt if an application was contemplated for the purpose of granting such a relief to an intending appellant to His Majesty in Council and if there was any period of limitation fixed for the making of such application and if the principle of S. 5 of the Limitation Act could be made applicable to such an application, there would have been no difficulty. But no such separate application is contemplated or referred to in the Civil Procedure Code, and there being no period of limitation prescribed for any such application, there is no room for the application of the principle of S. 5 of the Limitation Act.

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A limitation with reference to time may in form be either by way of prescribing a period of limitation or by way of conferring or limiting the jurisdiction of the Court. It is a matter entirely of form, and the intention of the legislature has to be gathered only from the form adopted. In O. 20, R. 11 of the Civil Procedure Code the Court is authorised at the time of passing the decree to make an order for the payment of the amount of the decree by instalment,and similarly in O. 21,R. 11 the Court is empowered at the time of the passing of the decree on the oral application of the decree-holder to order immediate execution of the decree by the arrest of the judgment-debtor, if he is within the precincts of the Court. The proper construction of such provisions has been held to be that the power granted should be exercised, if at all, by the Court only at the time indicated. It may be that the reason may not be clear or satisfactory for the legislature having laid such limitations. But however that may be, the construction being clear, we have no right to seek to get behind the rule by any inquiry into the reason of the rule.

It follows therefore that the Court may make an order with regard to the form of the security to be furnished by the appellant at the time of granting the certificate, and not after the certificate has been granted. But Mr. Ramachandra Aiyar, the learned vakil for the petitioner, has argued that the certificate is a document in writing containing a definite statement to the effect that in the opinion of the High Court the matter is a fit one for appeal to the Privy Council ; there is a form prescribed for such certificate, and the expression ' grant of a certificate ' could therefore only mean the actual issue and delivery over of such a document in the prescribed form. He has also in this connection drawn our attention to the decision of the Privy Council in the case of *Radhakrishna Das* v. *Rai Krishnachand* (3). In that case their Lordships of the Judicial Committee have undoubtedly drawn a sharp distinction between the certificate and the order for the certificate. The decision of their Lordships in that case undoubtedly lends considerable support to the contention on behalf of the petitioner. On behalf of the respondent we have also been referred to the judgments of their Lordships in the case of *Radhakrishna*

3. (1910) I L R 23 A 415 (P. C).

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Aiyar v. *Swaminatha Aiyar* (4) the same case when it came up before the Privy Council at an earlier stage. In the latter case the emphasis laid on the formal certificate issued by the Court would seem no doubt to support the contention for the petitioner, but the judgment in the former case where their Lordships referred to an order for certificate as a certificate and to there being two orders and to one of the orders embracing the actual certificate and so on, undoubtedly introduces an element of confusion. But it seems to me that in spite of the apparent confusion, it is possible to reconcile the judgment in the later case of *Radhakrishna Aiyar* v. *Sundaraswami Aiyar* (2) with the judgment in *Radhakrishna Das* v. *Rai Krishnachand* (3). What the law requires is a certificate by the Court. Being a judicial order, no doubt it has to be in writing ; and there is also no doubt that the granting of a certificate is a judicial act.

The question then resolves itself into this. On a proper construction of R. 7 and the connected sections when is the granting of the certificate by the Court—Is it at the time when the Court orders the certificate to be issued or is it at the time when the actual document called the certificate is issued by the Court or its officers ? The case of *Radhakrishna Das* v. *Rai Krishnachand* (3) is no decision on the construction of the expression 'granting of the certificate.' It merely draws a distinction between the certificate on the one hand and the order for the certificate on the other. That distinction is undoubtedly an important and material distinction. The case, however, of *Radhakrishna Aiyar* v. *Sundaraswami Aiyar* (2) would seem to show that there is a certificate granted whenever there is a document signed by the proper authority in which the judgment of the Court with regard to either the value of the subject-matter or the fitness otherwise of the case for appeal to His Majesty in Council is set out. In the present case however the order of this Court, dated the 29th of September, 1924, is not only in substance but in form such a certificate and therefore it would seem to follow that the Court would have had power to make any order as regards the form of the security only at the time when the said certificate was given. But assuming for the sake of

2. (1922) I L R 45 M 475 : 43 M L J 323 (P C).
3. (1901) I L R 23 A 415 (P C).
4. (1920) I L R 44 M 293 : 40 M L J 229 (P C).

argument that in form the order of the Court, dated the 29th of September, 1924, was not a certificate but was merely an order for the certificate, then we have to see whether on a proper construction the expression ' at the time of ganting the certificate ' refers to the formal certificate or to the order for the certificate. R. 2 of O. 45 prescribes a petition to be filed by the person intending to appeal to His Majesty's Council. Sub-clause 1 of R. 3 sets out that the prayer in the petition should be for a certificate, either that, as regards the amount or value and nature, the case fulfils the requirements of S. 110 or that it is otherwise a fit one for appeal to His Majesty in Council, and sub-clause 2 of R. 3 prescribes notice of the petition to the opposite party. R. 6 states that where such certificate is refused, the petition shall be dismissed; and R. 7 proceeds to lay down what the appellant should do where the certificate is granted.

The reference to the refusal of the certificate in R. 6 and the granting of the certificate in the opening words of R. 7 would in such juxtaposition undoubtedly seem to indicate that the grant or the refusal of the certificate takes place as the result of the disposal of the petition. The granting of the certificate being a judicial act, it ought more appropriately to refer only to the time when the decision of the Court is arrived at with regard to the grant or refusal and not to the time when the formal document is drawn up and issued.

Further on, in the same R. 7, the appellant is required to do and carry out certain matters relating to the appeal to the Privy Council within six weeks from the date of ' the grant of the certificate. ' If the expression ' grant of the certificate ' means the actual issue of the formal document called a certificate, then the six weeks will have to be computed from such date. But I see no reason in any rule which may be supposed to prescribe that such six weeks should be computed only from the date of the issue of the formal certificate; because if the object of the rule prescribing a period is to avoid delay, then there is no reason whatever why the legislature should be deemed to have postponed the computation of the time from any date other than the date on which the Court to the knowledge of the petitioner grants his application for a certificate.

Further, the second proviso also newly added to R. 7 lays down that no adjournment should be granted to any opposite party that appears for the purpose of objecting to the

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nature of the security. The expression 'any opposite party that appears' would seem clearly to indicate any such party appearing on the notice to the opposite party referred to in R. 3 of the order, that is to say in other words it is only any party that appears on the notice to show cause why leave should not be granted to the petitioner to appeal to the Privy Council that is allowed to object at the time with regard to the form or the nature of the security. This again would seem to contemplate beyond all doubt that the whole question with regard both to the granting or refusal of the certificate and the form of the nature of the security should be determined finally by orders made at the same time without any further delay.

It therefore follows that in the present case the certificate having already been granted, what the Court could have done if it was moved properly at the time of the granting of the certificate could not now be done. The petition therefore has to be dismissed; but in the circumstances of the case, it will be dismissed without any order as to costs.

T. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

T. S. Subbarao ... *Appellant** (*Plaintiff*)

v.

Appadurai Aiyar and others ... *Respondents* (*Defendants*).

Subbarao v. Appadurai Aiyar.

Civil Procedure Code, Sch. II, S. 1—"Party interested"—Meaning—Mortgage with possession—Suit for possession by mortgagee under, from persons claiming adversely to mortgagor—Mortgagor remaining ex parte *if interested in—Reference without consent of all parties interested—Irregularity or illegality—Award made on such reference—Void and need not be set aside—Consent subsequent of party interested not joining in reference—Reference if rendered validly.*

The words "parties interested in the suit" in S. 1 of Sch. II of Civil Procedure Code should not be restricted to those persons against whom relief is claimed. A person against whom no relief is claimed may be interested in the result of the suit, inasmuch as his liability to the plaintiff may ultimately arise by reason of any decision that may be given in that suit.

Held, that a mortgagor who was made a party to a suit brought by the usufructuary mortgagee to recover possession of the mortgaged property from persons who claimed the property adversely to the mortgagor was, though he remained *ex parte* "interested in the suit" within the meaning of S. 1 of Sch. II of Civil Procedure Code.

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*S A No. 21 of 1922. 30th October, 1924.

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A reference to arbitration made in a pending suit without the consent of all the parties interested in the litigation is not a mere irregularity but it takes away altogether the foundation of the Court's jurisdiction; the award made on such a reference is absolutely void and does not require to be set aside. In such a case the award ought to be set aside as illegal and the suit proceeded with.

A person who was not a party to a reference to arbitration cannot, by subsequently appearing before the arbitrator and giving his consent to the arbitration proceedings, make the reference valid. What gives the Court jurisdiction to refer is consent of all the parties. Consent subsequently given cannot give jurisdiction to the Court which it did not possess at the time when it referred the matter to arbitration.

Second Appeal against the decree of the Court of the Second Additional Subordinate Judge of Tanjore in A. S. No. 120 of 1920 (A. S. No. 465 of 1920 on the file of the District Court, Tanjore) preferred against the decree of the Court of the District Munsif of Tanjore in O. S. No. 205 of 1918.

T. L. Venkatrama Aiyar for appellant.

S. Duraiswami Aiyar and *V. Th̲ ̲uraja Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff sues for possession of the plaint property alleging that he is the usufructuary mortgagee from the 3rd defendant. Defendants 1 and 2 claim the property as theirs. Both the Courts have dismissed the plaintiff's suit on the ground that in a previous suit O. S. No. 89 of 1916 the plaintiff sued for similar reliefs ; and a reference was made to arbitration in that suit and an award was made by the arbitrator, and therefore the present suit is barred by reason of that award. The contention of Mr. Venkatrama Aiyar for the appellant is that the award was passed on a reference by the Court without jurisdiction inasmuch as all the persons interested in the suit did not join in the submission, and therefore the award does not stand in the way of his obtaining relief in this suit. The facts appear to be : the plaintiff sued for possession of the property against defendants 2 and 3 in Suit No. 89 of 1916 who are defendants 1 and 2 herein and his mortgagor was the 4th defendant. Defendants 2 and 3 claimed title from the 1st defendant, and reference was made to arbitration by the plaintiff and defendants 1 to 3. 4th defendant remained *ex parte* and did not join the reference.

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An award was made by the arbitrator, but before the award could be made a decree of Court, the plaintiff withdrew the suit with liberty to bring a fresh suit. The District Munsif allowed him to withdraw the suit and gave him leave to bring a fresh suit. If the award is a valid award, no doubt it would be a bar to the present suit. The question is whether a reference to which all the persons interested are not parties is a valid reference. S. 1 of Sch. 2 of the Civil Procedure Code is in these terms : "Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference." The section requires that all the parties interested should agree before the Court could make a valid reference to an arbitrator. The contention for the respondent is that the persons against whom relief is claimed are the only necessary parties and that *pro forma* parties may or may not be parties to the reference. It is also urged that the 4th defendant in this case who was *ex parte* was not interested in the suit inasmuch as the suit was only for possession of the property, and the 4th defendant being the mortgagor no relief was claimed against him by the plaintiff in the suit.

One of the main issues in the case was whether the properties belonged to the 4th defendant, or whether they belonged to the 1st defendant. It follows therefore that the 4th defendant was interested in the decision of the suit. If the plaintiff failed in making out title in the 4th defendant, 4th defendant being a party to the suit, any decision against the plaintiff would be *res judicata* between the defendants 2 and 3 and the 4th defendant, for the defendants 2 and 3 set up a title by purchase from the 1st defendant and the plaintiff sets up a title as mortgagee from the 4th defendant. There was therefore a conflict of interest between the 4th defendant and the defendants 1 to 3. It cannot be said that the 4th defendant was not a party interested in the suit. I do not think that the words " parties interested in the suit " should be restricted only to those persons against whom relief is claimed. A person against whom no relief is claimed may be interested in the result of the suit, inasmuch as his liability to the plaintiff may ultimately arise by reason of any decision that may be given in that suit. So far as the facts in O. S. No. 89 of 1916 are concerned there can be no hesitation in

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holding that the 4th defendant was vitally interested in the result of the plaintiff's suit, and therefore I consider that the contention of the respondent's vakil that the 4th defendant having been *ex parte* and the plaintiff having undertaken to prove the 4th defendant's title, 4th defendant was not an interested party cannot be accepted.

The next question is whether the reference without a party interested in the litigation joining in it is a valid reference. The view of the Allahabad High Court is that if the defendant is *ex parte* he need not be a necessary party—vide *Ajudhia Prasad* v. *Badar-ul-Hussain* (1). But both the Calcutta High Court and the Madras High Court have taken the view that in order that a reference under the Civil Procedure Code, Sch. II, may be a valid reference, all the parties should join in the reference. In *Seth Dooly Chand* v. *Mamuji Mussaji* (2) the learned Chief Justice and Mukerjee, J., held that all the parties to the suit should join in asking the Court to refer the matter to arbitration. In other words, all the parties must be parties to the reference to arbitration. The learned Chief Justice observed at p. 391 : "As I have said before, by reason of the fact that all the parties did not join in the application or did not agree to it this was an invalid reference." This was followed by a Full Bench of this Court in *Potita Pavana Panda* v. *Narasinga Panda* (3). The Allahabad High Court has taken the same view in *Hasha* v. *Mahbub* (4).

It is next contended on behalf of the respondent that the 4th defendant got the *ex parte* decree set aside, appeared before the arbitrator and signed the compromise, and therefore it must be taken that his subsequent consent to the arbitration gave validity to the reference. 4th defendant no doubt had the *ex parte* decree set aside, and he and defendants 2 and 3 signed the compromise before the arbitrator, but the plaintiff was not a party to the compromise. Though time was given to his Vakil, he did not appear before the arbitrator and sign the compromise. Whether a person who was not a party to the reference can subsequently appear before the arbitrator and give his consent to the arbitration proceedings and thereby make the reference valid is a question which

1. (1917) I L R 39 A 489. 2. (1916) 21 C W N 387.
3. (1919) I L R 42 M 632: 36 M L J 538 (F B). 4. (1911) 10 I C 559.

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is not altogether free from difficulty. This point was considered in *Favaguddin* v. *Aminuddin* (5) in the case of a reference to arbitration under the old Civil Procedure Code. It was held that " where a suit was referred to two arbitrators, and an umpire was nominated and agreed upon by the parties, but the latter refused to act, the Court has no jurisdiction to appoint an umpire in his place, if the parties did not consent to such appointment, and that the reference to such arbitration was invalid and that subsequent acquiescence of the parties in the proceedings of the arbitrators would not validate the reference if it was made by the Court without jurisdiction." The reference to arbitration is by the consent of the parties. In order to make a valid reference it is necessary that all the parties should give their consent. But after a reference is made. subsequent consent by one of the parties who did not join in the reference at the time it was made cannot make the proceedings valid for the foundation of the Court's jurisdiction is the consent of all the parties. Mukerjee, J. in *Seth Dooly Chand* v. *Mamuji Mussaji* (2) makes the following observation : "The entire foundation of the jurisdiction of the Court is removed as soon as it is established that the parties have failed to comply with the fundamental requirements of the statute embodied in the first paragraph of the second Schedule of the Civil Procedure Code. " What gives the Court jurisdiction to refer the matter to arbitration is consent of all the parties. Consent subsequently given cannot give jurisdiction to the Court which it did not possess at the time when it referred the matter to arbitration.

It is next contended that it is only an irregularity and therefore the irregularity has been cured by the subsequent consent. But as I have already held reference without the consent of all the parties to the arbitration is not merely an irregularity but it takes away altogether the foundation of the Court's jurisdiction. That being so, the award is absolutely void. That is to say the Court can treat it as if it never existed.

The third objection urged by the respondent's Vakil is that it is necessary that the award should be set aside before the plaintiff could bring his suit. Inasmuch as the award is absolutely void as having been passed on a reference by a

2. (1916) 21 C W N 387 at 394. 5. (1909) 6 A L J 351.

Court which acted without jurisdiction I think it is unnecessary to consider this objection at length.

It is also contended that inasmuch as the proceedings were illegal the Court had power to set aside the proceedings and proceed with the suit. But unfortunately for the respondent the Court did not proceed with the suit but allowed the plaintiff to withdraw the suit with liberty to bring a fresh suit. I say unfortunately advisedly because the District Munsif ought to have set aside the award when he found that the 4th defendant was not a party to it and should have either dismissed the plaintiff's suit or should have proceeded with the suit. But he allowed the plaintiff to withdraw the suit the moment he came forward with a request to that effect. I therefore hold that the award in the previous suit, O. S. No. 89 of 1916 is no bar to the present suit.

In the result the decrees of the lower Courts are set aside and the suit remanded for trial to the District Munsif's Court for disposal according to law. Considering the conduct of the plaintiff in having consented to the reference to arbitration and afterwards having suddenly withdrawn the suit when he found that the award was against him, I think he ought not to get the costs of these proceedings, that is costs of the appeal and of second appeal in case he were to succeed in the suit. In any event he should not get costs of the suit. But if he fails in the suit it is but fair and just that he should pay the defendant's costs of the proceedings both here and the Lower Appellate Court as well as costs of the Trial Court.

The Court-fee will be refunded.

A. S. V. *Decrees set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Sri Kallalagar Devasthanam through its Manager, R. Krishnaswami Aiyangar ... *Appellant** (*Defendant*)

v.

Anthony Moopan ... *Respondent* (*Plaintiff*).

Kallalagar Devasthanam v. Anthony Moopan.

Madras Estates Land Act, Ss. 6 (1), 3 (5)—Landholder—Trustee of Devasthanam recognised as landholder by revenue authorities if a—Person let by him into possession of ryoti land of Devasthanam if acquires occupancy right.

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*S A No. 815 of 1923. 17th October, 1924.

Kallalagar Devasthanam v. Anthony Moopan.

The word "landholder" in S. 6 (1) of the Madras Estates Land Act does not mean "landowner." It means a "landholder" as defined in S. 3 (5) of the Act.

S, who was appointed trustee of a Devasthanam by the temple committee in 1911 and was recognised as landholder by the revenue authorities, admitted the plaintiff into possession of ryoti land of the Devasthanam.

Held, that *S* was a landholder within the meaning of S. 6 (1) of the Act. and that by virtue of that clause the plaintiff acquired an occupancy right in the land let to him.

Held, further that the act of *S* in so letting the land was one in the ordinary course of the management of the property of the trust and that *S* did not exceed his powers in letting the plaintiff into possession of the land.

Second Appeal against the decree of the District Court of Madura in A. S. No. 282 of 1921, preferred against the decree of the Court of the Deputy Collector of Melur Division in Summary Suit No. 69 of 1921.

A. Srinivasa Aiyangar for appellant.

K. V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The first point urged in this second appeal is that Sundararama Sastri who let the plaintiff into possession was not the landholder within the meaning of S. 3 of the Estates Land Act. The contention of Mr. A. Srinivasa Aiyangar is that though a person may be a landholder within the meaning of S. 5 yet he is not landholder for the purpose of letting a tenant into possession of ryoti land so as to give him occupancy right under S. 6. The evidence on record shows that Sundararama Sastri was appointed trustee by the temple committee in 1911 and he was recognised as landholder by the revenue authorities. S. 3, cl. 5, para. 2 says : "The person who shall be deemed to be the landholder for such purposes shall be the person whom the Collector subject to any decree or order of a competent Civil Court may recognize or nominate as such landholder in accordance with rules to be framed by the Local Government in this behalf." The simple question is whether the word "landholder" used in cl. 5 of S. 3 means landowner as contended by Mr. A. Srinivasa Aiyangar or landholder as defined in S. 3, cl. 5. It is argued for the appellant that if a person who is not a full owner is allowed to let into possession tenants who would get occupancy right in ryoti land under S. 6 it would be detrimental to the interests of an institution like the temple and therefore the word "landholder" in S. 6, cl. 1 must

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be interpreted so as to give it a restricted meaning. It may be that the framers of the Act intended that the word "landholder" in S. 6 should be understood as defined by them in S.3 (5) and there is no warrant for saying that the word "landholder" in S.6 (1) should be interpreted to mean "landowner." Such an interpretation would be against all the rules or cannons of construction and I am not prepared to hold that in S. 6 the word "landholder" has a restricted meaning. The plaintiff was admitted into possession of the ryoti land belonging to the Devasthanam by Sundararama Sastri, the then trustee. Sundararama Sastri being a landholder within the meaning of S. 6 (1), I think the plaintiff by virtue of that clause has acquired an occupancy right in the land the possession of which was given by the manager of the Devasthanam.

The next contention urged by Mr. A. Srinivasa Aiyangar is that the manager had no power to give occupancy right to the plaintiff and that he acted in contravention of the orders of the temple committee and the plaintiff was aware of such orders and therefore the plaintiff cannot have occupancy right in the plaint land. Mr. Srinivasa Aiyangar relies upon *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (1), *Amarnath Sah* v. *Achan Kriar* (2) and *Obala Kondama Naicker Ayyan* v. *Kandasami Goundan* (3). It is unnecessary to consider the cases of limited owners who alienated the property and purported to give full title to the vendee. It is also unnecessary to consider the cases where the trustee's action in giving permanent lease was discountenanced by the Courts. In this case the land being ryoti land it was necessary that it should be cultivated by some tenant. It was not likely that the temple committee would cultivate the land directly. It is not likely that Sundararama Sastri or any other manager would himself cultivate the land ; and one of the proper modes of enjoyment of the ryoti land is by giving the land to tenants for the purpose of cultivating it and getting the rent due on the land. The act of the manager Sundararama Sastri was not an act outside the scope of his authority. It was an act in the ordinary course of manager of the property belonging to the trust. That being so, it cannot be said that he has exceeded his powers in letting the plaintiff into possession of the land. Whether the tenant takes the land for 20 years or 40 years

1. (1917) I L R 40 M 709 : 33 M L J 1. 2. (1892) I L R 14 A 420.
3. L R 51 I A 145.

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it does not matter, for the moment the landholder lets a tenant into possession of ryoti land by virtue of S. 6 he acquires occupancy right. The landlord cannot by any contract with him limit that right which is given to him by S. 6. That being so, these cases have no application to the present case. The finding by the Lower Appellate is that the plaintiff paid the Nuzzur and took the lease without the knowledge of anything that happened between the trustee and the temple committee and it is not likely that the plaintiff would have been aware of the correspondence that took place between the trustee and the temple committee. The temple committee did authorise Sundararama Sastri to let the land to tenants. and it even recommended that the land should be given to one Ranganadhiar on terms similar to those on which the manager has let the land to the plaintiff, and the only difference being that in the case of Ranganadhiar the term was 20 years. But as I have already observed, whether the landholder lets the tenants into possession for 20 years or more the moment the tenant enters upon the land, by virtue of S. 6 he gets occupancy right in the ryoti land. There is no other point urged. The second appeal fails and is dismissed with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Kanchinadham Suryanarayanamurthi .. *Appellant** (*Plff.*)

v.

Bandi Satyanarayanamurthi and another ... *Respondents* (*Defts. Nos.* 1 *and* 2).

Suryanarayanamurthi v. Satyanarayanamurthi.

Contract Act, S. 55—Contract for sale of land—Impossible condition—Time for performance—Default—Specific performance.

Though in contracts for the sale of land time is not generally of the essence of the contract, it is open to the parties to make time essential by a clear stipulation to that effect. *Jamshed Khodaram Irani* v. *Burjorji Dhunjibai,* I L R 40 Bom 289 referred to.

A vendee under a contract of sale cannot subsequently impose a new and impossible condition on the vendor and plead default on the part of the latter if he is unable to fulfil that condition.

Second Appeal against the decree of the Court of the Subordinate Judge, Rajahmundry, in A. S. No. 52 of 1921 (A. S. No. 24 of 1921, District Court, Godavari), preferred

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*S. A. No. 593 of 1922. 12th September, 1924.

Suryanarayanamurthi v. Satyanarayanamurthi.

against the decree of the Court of the District Munsif of Amalapuram in O. S. No. 909 of 1919.

K. Ramamurthi for appellant.

P. Somasundaram and *Pappu Satyanarayana* for respondents.

The Court delivered the following

JUDGMENT :—This Second Appeal arises out of a suit for specific performance by the plaintiff. The first point urged in the second appeal is that the lower Court was wrong in finding that there was default on the part of the plaintiff. The appellant's contention is that he was ready and willing to perform his part of the contract and that the default was on the part of the first defendant. The contract was entered into on the 20th August, 1919, and an advance of Rs. 100 was paid on that day. The contract was that the balance was to be paid by 31st August, 1919. On the 30th August, 1919, plaintiff sent a registered notice through his vakil to the defendant imposing certain conditions, which were not in the contract of sale, Ex. A. In that he said that the property should be divided by metes and bounds before the expiry of 24 hours from that date. The notice was sent on the 30th August, 1919 and it was not humanly possible to have the property divided by metes and bounds within 24 hours from the receipt of the notice and that before the end of August, 1919. The object of the plaintiff was evidently to get out of the contract by imposing conditions not possible to comply with, and that was why he insisted upon the first defendant doing something, which he was not only not bound to do, but which was not possible to do within the time allotted to him. Plaintiff knew at the time he entered into the agreement for sale that the 1st defendant agreed to sell only his share of the property and that he and the 2nd defendant were jointly interested in the property and that the property agreed to be sold was in possession of a tenant. That being so, it is quite clear that the object of the plaintiff in imposing an impossible condition was to back out of the contract. The Subordinate Judge has given reasons for coming to that conclusion and I do not think that he has arrived at a wrong conclusion on that point.

It is next urged on the authority of the decision of the Privy Council in *Jamshed Khodaram* v. *Burjorji Dhunjibhai* (1) that time was not of the essence of the contract and

1. (1915) I L R 40 B 289 (P C).

Suryanarayanamurthi v Satyanarayanamurthi.

the plaintiff was therefore entitled to succeed in this action. No doubt in cases of contracts of sale of land, time as a rule is not of the essence of the contract; but it is open to the parties to make time of the essence of the contract. As observed by Lord Haldane in delivering the judgment of their Lordships of the Privy Council :—

"But to have this effect, the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable."

Here, as found by the learned Subordinate Judge, the parties did attach importance to the completion of the contract on the 31st August, 1919, and that is the reason why a penalty of Rs. 100 was fixed for non-performance. Granting for argument's sake that the first defendant was not entitled to consider the contract as broken, on account of the plaintiff's failure to tender the amount of Rs. 500 on or before the 31st, Ex. C clearly shows that the 1st defendant was willing to perform his part of the contract.....provided the plaintiff was willing to perform his part. He gave him reasonable time. as is seen from Ex. C, a registered letter, dated 1st September, 1919, and the plaintiff did not choose to avail himself of that opportunity. In these circumstances, I think the learned Judge was perfectly right in holding that the default lay on the part of the plaintiff and therefore he is not entitled to any remedy.

The Second Appeal fails and is dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

V. Manickam Pillai ... *Petitioner* (Deft.)*

v.

Mahudam Bathummal and others ...*Respondents (Plaintiff and Defts. 1 to 5 and 7).*

Manickam Pillai v. Mahudam Bathummal.

Civil Procedure Code, S. 115 and O. 9, R. 9—Dismissal of suit for default—Setting aside order for dismissal—Grounds for—Revision—Interference by High Court.

On an application to set aside an order of dismissal of a suit for default, the Trial Court held that there was no sufficient ground for the absence of the plaintiff or her pleader on the day fixed for hearing but at the same time set aside the order of dismissal as a matter of grace and also having regard to the large amount involved. Subsequently the suit was tried on the merits and

*C. R. P. No. 899 of 1922. 27th August, 1924.

decreed in part. On an application for revision to the High Court, *held,* that the Court below had no jurisdiction to set aside the order of dismissal for default in the absence of the grounds specified in O. 9, R. 9, Civil Procedure Code, and that the High Court was bound to interfere and set aside the order of the lower Court, even though the suit had been subsequently tried and decreed.

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Neelaveni v. *Narayana Reddi,* 43 M. 94 (F. B.) relied on.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin in I. A. No. 558 of 1922 in O. S. No. 16 of 1921.

P. V. Krishnaswami Aiyar for petitioner.

A. Swaminatha Aiyar and *K. R. Rangaswami Aiyangar* for respondents.

The Court delivered the following

JUDGMENT :—This is a petition for the revision of the order of the Subordinate Judge of Tuticorin setting aside on certain conditions the dismissal of the plaintiff's suit for default of appearance. The allegations in the petition to set aside the dismissal were that the plaintiff is a Mahomedan woman, whose husband had lately died and who therefore could not appear in Court; that on the day of hearing, 6th April, 1922, the plaintiff's Vakil appeared before the Court and asked for an adjournment, apparently because the witnesses had not been served and had not turned up, although batta had been paid for process, that on the adjournment being refused, the Vakil reported no instructions and the suit was then dismissed for default of appearance.

That an order of dismissal for default of appearance was the proper order in such circumstances has been now clearly laid down by a Full Bench of this Court in this very case, the question referred to it being whether when a pleader has instructions to apply only for an adjournment and when the adjournment is refused, it is a case of non-appearance of the party and the dismissal of the suit is for default of appearance.

As to the reasons for non-appearance, even on the facts in the affidavit, the plaintiff's domestic situation was not preventing her from prosecuting this suit or from taking out process to the witnesses for the date of hearing and her son

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was looking after the case for her. In these circumstances, the lower Court was constrained in its order to admit that :

The allegations in the affidavit are no doubt not sufficient *per se* to excuse the default. But having regard to the fact that plaintiff is a woman and the value of the suit is nearly Rs. 10,000, I think the dismissal may be set aside on terms as a matter of grace.

And in consequence, as a matter of grace, it set aside the dismissal. I am asked by the respondent in this petition to hold that what the Subordinate Judge really meant was that the plaintiff had shown good cause for not appearing. I am quite sure the Subordinate Judge did not mean this and I agree with him that the plaintiff did not show good cause for not appearing. The setting aside the dismissal was therefore, a mere act of grace, or clemency on the part of the learned Subordinate Judge. Now O. 9, R. 9, Civil Procedure Code, gives no power to a Court to set aside a dismissal of a suit for default of appearance as a matter of grace, nor has a Court any inherent power to do so. I think the principle laid down in *Neelaveni* v. *Narayana Reddi* (1) by a Full Bench in interpreting O. 9, R. 13, Civil Procedure Code, applies equally to O. 9, R. 9, Civil Procedure Code. The ruling to the contrary cited by the plaintiff, namely, *Gopala Rao* v. *Maria Susaya Pillai* (2) was quoted in the discussion in the Full Bench case and has been referred to and implicitly dissented from in the judgment of the Officiating Chief Justice. It is not therefore open to a Court to set aside, as a matter of grace, a dismissal of a suit for default of appearance. I think it would introduce a most undesirable element of uncertainty into the trial of cases, if it was to be held that a Court may, as a matter of grace, go beyond the law of procedure, whenever it feels that that law is acting harshly. It has often been said that hard cases make bad law, and the present case is no exception. I am bound to hold that the Subordinate Judge had no jurisdiction to pass his order.

When an order is passed wholly without jurisdiction, this Court is bound to interfere and not allow it to remain in force. A party who goes to law is entitled to insist that the law shall be followed and that an order not in accordance with the law shall not be allowed to be in force. It is urged in this case, by the plaintiff that, as the petitioner did not apply for any stay of trial, while his Revision Petition was pending, the trial

1. (1919) I L R 43 M 94 : 37 M L J 599 (F B).
2. (1906) I L R 30 M 274 : 17 M L J 225.

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actually went on and that she has obtained a decree for Rs. 4,000, which decree is now pending appeal in this Court and I am urged not to interfere in revision, when there has been in fact a trial of the case on the merits between the parties. I feel the weight of this contention ; but I am of opinion that it cannot balance the weight of the other principle already cited, namely, that an order passed without jurisdiction cannot be allowed to remain in force. I must therefore set aside the order of the lower Court, as passed without jurisdiction, and the dismissal of the suit for default therefore remains.

As the petitioner, by not applying for the stay of trial, has unnecessarily occasioned much expenditure to the plaintiff, in continuing the trial of the suit, I refuse him his costs. Each party will bear his own costs here and below.

A. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE SRINIVASA AIYANGAR.

V. S. Gopalaswami Aiyar ... *Appellant** (*Plaintiff*)

v.

Kachi Kalyana Rangappa Kalakka Thola Udayar and others ... *Respondents* (*Defdts.* 1, 2, 4, 6 *and* 7).

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Registration Act, S. 17, cl. (2), sub-cl. (2)—Mortgage—Endorsement on acknowledging payment of mortgage money—Receipt for payment of money due under mortgage—Registration—Necessity—Hindu Law—Joint family—Manager—Mortgage in favour of family—Waiver of portion of amount due under, and grant of discharge on receipt of balance—Binding character of on other members—Waiver and discharge by senior male member—Ratification by other divided member—Ratification by next friend of minor divided member—Effect.

Held, that an endorsement on a deed of mortgage to the effect that the sum of Rs. 6,000 odd had been received in full satisfaction of the amount due under the mortgage and that an independent receipt granted to the mortgagor reciting the acknowledgment of the sum mentioned above and adding the words "You shall take this as the receipt for the discharge of the hypothecation deed" were admissible in evidence to prove the discharge of the mortgage, though the endorsement and the receipt were not registered.

The waiver by the manager of a joint Hindu family of a portion of the amount due under a mortgage in favour of the family and a discharge granted by him to the mortgagor on receipt of the balance due under the mortgage would be binding on the other members if in so waiving and granting the discharge the manager acted prudently and for the benefit of the family.

*Appeal No. 350 of 1921. 10th October, 1924.

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Held further that, even in a case in which the members of a family entitled to the amount due under a mortgage were divided, the act of the senior male member in waiving a portion of the amount due under the mortgage and in granting a discharge to the mortgagor on receipt of the balance would be binding on the other member if the said act was subsequently ratified by him, and that, for this purpose, the ratification by the next friend of a minor member would stand on the same footing as if it were a ratification by the minor himself on his attaining majority.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 48 of 1918.

The Advocate-General for plaintiff.

K. Ramachandran, S. Varadachariar and *R. Gopalaswami Aiyangar* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—The plaintiff has filed this suit to enforce a mortgage, refusing to recognise the discharge given to the mortgagors by his paternal uncle, the 5th defendant. The question to be decided is very simple. If the plaintiff and the 5th defendant were members of a joint undivided Hindu family, the act of the 5th defendant, who was the senior male member, would be binding on the plaintiff as the Judge has found that in waiving a portion of the amount due and giving a discharge, the 5th defendant acted prudently and for the benefit of the family and this finding has not been attacked before us. If, however, on the date the 5th defendant entered into the transaction, he and the plaintiff were divided, the act of the 5th defendant would still be binding on the plaintiff as it was subsequently ratified by the plaintiff's next friend in the agreement of compromise which was ultimately made a decree of the Court in Suit No. 9 of 1909 and in this connection I must observe that it was conceded before us that the ratification by the plaintiff's next friend would stand upon the same footing as if it were a ratification made by the plaintiff himself on his attaining majority.

On either hypothesis therefore the appeal must fail. A point, however, was taken for the first time before us by the learned vakil for the appellant that the discharge of the mortgage cannot be proved as the writing evidencing the discharge has not been registered. This argument is untenable. Ex. X is an endorsement on the deed of mortgage itself which is to the effect that the sum of Rs. 6,480 was received in full satisfaction of the amount due under the mortgage. Ex. XVI is

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an independent receipt granted to the mortgagor. It recites also the acknowledgment of the sum mentioned above and there are the following words :—" You shall take this as the receipt for the discharge of the hypothecation deed. " Sub-clause (*ii*) of cl. 2 of S. 17 of the Registration Act runs thus :

" Nothing in clauses (*b*) and (*c*) of sub-section applies to any endorsement on a mortgage deed acknowledging the payment of the whole or in part of the mortgage money and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage."

This clause contemplates (1) an endorsement on a mortgage deed, and (2) any other independent receipt for payment of money. In the case of an independent receipt it is necessary that it must not purport to extinguish the mortgage. But so far as an endorsement on the mortgage deed is concerned, no such limitation is placed.

In the present case I do not think Ex. XVI, the receipt mentioned above, contains any words purporting to extinguish the mortgage and it is not sufficient that the effect of the words is to produce that result. But even granting that there are such words in the receipt, the defendant can fall back on the endorsement and prove by it that the mortgage debt has been discharged. It is owever noticeable that in the endorsement there are not even words purporting to extinguish the mortgage. The appe ant's contention therefore is utterly unfounded and must b overruled. *Lakshmana Chetty* v. *Chenchuramayya* (1) re rred to by the appellant's learned vakil has no bearing on th question to be decided and it is unnecessary to consider it. The appeal therefore fails and is dismissed with the costs of respondents 1 and 2.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The only question argued in this appeal, indeed the only point on which we required to be satisfied in the first instance, was whether the learned Subordinate Judge was wrong in holding that the plaintiff, the appellant before us, is precluded from questioning the discharge of the suit mortgage granted by the original 5th defendant in the suit. The learned vakil who appeared for the appellant has entirely failed to satisfy us that the decision on that matter of the learned Subordinate Judge was wrong. The original mortgagee was one Sundarappa Aiyar, father of the plaintiff, who died leaving the plaintiff, his son, and Venkatrama Aiyar, his step-brother, as the surviving members of the joint family.

1. (1917) 34 M L J 79.

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Both these were minors at his death. Pursuant to an agreement made by the mother of the 5th defendant purporting to act for the family, the 5th defendant, after he came of age, agreed to receive a sum of Rs. 6,480 in full satisfaction and discharge of the amount due from the mortgagors. This would seem to have been done by him *bona fide* in the interests of the family. In evidence of this discharge he passed to the mortgagors Ex. XVI. When both the plaintiff and the 5th defendant were still minors, there was a partition sought to be brought about between them by their respective mothers and this arrangement of partition was embodied in Ex. A. Subsequent to Ex. XVI, that is to say, subsequent to the discharge granted by the 5th defendant, O. S. No. 9 of 1909 on the file of the Subordinate Judge's Court at Mayavaram was instituted in the name of the plaintiff by his maternal uncle as his next friend. This suit was no doubt based on the footing of Ex. A being a partition binding on the parties. But the defendant—the 5th defendant in this case—denied the validity of the partition and set up that the family was still joint. One of the items in the suit in respect of which the plaintiff's half share was demanded was the amount of the said mortgage. But the suit was compromised and Ex. III is the *razinama* decree passed therein. That decree was on the basis that there had been no valid partition between the parties, and that the action of the 5th defendant in claiming to represent the family and granting a discharge to the mortgagors under Ex. XVI, receiving the sum of Rs. 6,480 was binding on the plaintiff, and the *razinama* decree further proceeded to determine the shares of the parties on that basis. This *razinama* decree has not been set aside but on the other hand been not only acquiesced in by the plaintiff after he came of age but has been made the basis of other claims made by him. In Ex. XVI the 5th defendant acted not only for himself but purported to act also for the plaintiff as his guardian. If the 5th defendant was the manager of the joint family at the time of his granting the discharge and if the discharge granted by the 5th defendant was *bona fide* and in the interests of the family as found by the learned Subordinate Judge, then it follows that the plaintiff could not re-open it or ask for his share of the mortgage moneys on the footing that there had been no valid discharge. Assuming that the 5th defendant was not the manager of the joint family and had no power to grant a discharge in that capacity, then the position is this.

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The 5th defendant purported to act as the guardian of the plaintiff in the transaction. The transaction was therefore liable to be avoided by or on behalf of the minor plaintiff. But by the said *razinama* decree in O. S. No. 9 of 1909 the plaintiff was decreed to be bound by the discharge granted by the 5th defendant. Even on the assumption therefore that the discharge originally granted by the 5th defendant was voidable by or at the instance of the minor plaintiff, by reason of the said decree in O. S. No. 9 of 1909 the right to avoid the discharge was finally put an end to. The *razinama* decree was passed with the sanction of the Court granted on behalf of the minor plaintiff. We asked the learned vakil who appeared for the appellant whether he was going to argue that such a decree passed in respect of a minor with the sanction of the Court would in law be in a different position to a decree passed in respect of an adult, and he properly intimated to us that he did not propose to argue for any such position. We therefore fail to see how the plaintiff whose right, if any, to avoid the discharge has been either found against or put an end to by the compromise decree, can be entitled to any relief on the footing that there has been no valid discharge binding on him. We have therefore come to the conclusion that the learned Subordinate Judge was right in his decision on the point.

The learned vakil who appeared for the appellant however wished to argue a question of law not raised before the lower Court and not even raised in the grounds of appeal here, on which he contended he was entitled to succeed on the question whether or not there had been a valid discharge. As the question raised was a pure question of law and as the other side did not strenuously oppose, we allowed him to argue the point. His contention was that Ex. XVI the receipt granted by the 5th defendant was not receivable in evidence, as it is a document required to be compulsorily registered and was not so registered. For this position, reliance was placed on cl. (*b*) in S. 17 which prescribed compulsory registration for all non-testamentary instruments which purport or operate to limit or extinguish whether in the present or future any right. title or interest of the value of Rs. 100 or upwards to or in immoveable property. In the same section, Exception 11 to cl. (*b*) provides that any endorsement on a mortgage deed acknowledging the payment of the whole or in part of the mortgage money and any other receipt for the payment of the money due under a mortgage when the receipt does not purport

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to extinguish the mortgage need not be registered. The learned vakil who appeared for the appellant argued that Ex. XVI would not fall under the 11th exception because while no doubt the mere endorsement on a mortgage deed acknowledging the payment of the whole or any, in part, of the mortgage money need not be registered, the receipt of a part of the amount due in full satisfaction of the whole amount due was not contemplated or covered by the exception. But Exception 11 also excepts from the operation of cl. (*b*) of S. 17 'any other receipt for the payment of the money due under a mortgage when the receipt does not purport to extinguish the mortgage.' There are no words in Ex. XVI which purport to extinguish the mortgage. In the body of cl. (*b*) all instruments which purport or operate to limit or extinguish certain rights are included, but in the exception the words 'or operate' are not repeated. This is significant, and the obvious conclusion to be drawn from this deliberate difference in the wording is that receipts granted for money may extinguish the debt and may therefore operate to extinguish the security; but if they do not purport in terms to extinguish the security they need not be registered. The learned vakil who appeared for the appellant drew our attention to the decision of this Court in the case of *Lakshmana Chetty* v. *Chenchuramayya* (1) as an authority for the position contended for by him with regard to the admissibility of Ex. XVI under the Registration Act. At the outset we may observe that that decision has no bearing on the present case. That was clearly a case of a contract the performance of which was being sought to be enforced. Further it was not the case of a payment made or accepted in respect of which either an endorsement was made or a receipt was granted and therefore obviously the terms of Exception 11 to cl. (*b*) of S. 17 of the Registration Act had no application. If the document should be merely an agreement to reduce the amount payable under the mortgage, it is conceivable that it might fall within the terms of cl. (*b*) of S. 17 because it may, though not purporting to do so, operate to limit or extinguish rights in immoveable property. All the decisions referred to by the learned Judges as authorities for the position were all cases only of agreements which would operate to create or limit such interests in immoveable property. None of those cases were cases of receipts or discharges for payment of the

1. (1917) 34 M L J 79.

mortgage amount accepting a smaller amount in lieu of the whole. The contention therefore that Ex. XVI is not admissible in evidence also fails.

In view of our finding that the plaintiff-appellant is precluded from questioning the discharge it has become unnecessary to consider the other questions raised in the appeal. The appeal therefore fails and must be dismissed with the costs of 1st and 2nd respondents.

A. S. V. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice*, MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

The Acting Secretary, Board of Revenue (Separate Revenue) ... *Petitioner-Referencer**

v.

The Agent, South Indian Railway Company Ltd., Trichinopoly ... *Respondent.*

Stamp Act of 1899, Sch. I-A, Arts, 30, 4 (c)—Lease—License—Distinction—Test—Agreement by S. I. Ry. Co. giving leave to merchants to store goods in station yards a lease or a license—Deed—Construction.

The test of whether a document is a lease or not is whether it vests any exclusive interest in immoveable property in the transferee or whether it gives him merely a right to enter upon the property and to do something thereon. The circumstance that the lessor had no legal right to lease out the property does not affect the question. Even a person without a title to land may execute what purports to be a lease of that land. The test is not the right of the lessor to give the lease, but the interest intended by him to be created by the document.

Held, that certain documents entered into between the South Indian Railway Company and certain coal merchants by which the latter were given leave to store coal on small plots of land in station yards were not leases requiring to be stamped as such under Art. 30 of Sch. I-A of the Stamp Act of 1899, but were mere licenses which fell within the description of agreements not otherwise provided for under Art. 4 (*c*) of the same Schedule.

The circumstances chiefly relied upon for the view that the documents were licenses and not leases were (1) that the drawers of the documents were evidently anxious to avoid giving leases so as not to contravene the instructions of the Government of India that Railway Companies had no permission to lease lands in their possession without the concurrence of the Secretary of State,

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*R C No. 6 of 1924. 15th October, 1924.

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(2) that throughout the documents the persons who were given possession were called "licensees," and (3) that there was in each of the documents an express provision that "nothing herein contained shall be construed to create a tenancy in favour of the licensee."

Held, that the fact that certain clauses of the agreement in each case imposed conditions which would be ordinarily implied by the grant of a license but would be exceptions to the grant of a lease, did not necessarily indicate that it was a lease, as the said clauses might have been inserted *ex abundante cautela.*

Case stated under S. 57, Act II of 1899, by the Acting Secretary to the Board of Revenue (Separate Revenue), in his Reference No. 59 Mis., dated 5th March, 1924, for the decision of the High Court regarding stamp duty chargeable on a document which is termed an agreement dated 21st April 1922 between the South Indian Railway Company, Ltd., and the Chairman, Municipal Council, Chidambaram, by which the Company (S. I. Ry.) let out a piece of land to the Municipal Council for storing coal.

AGREEMENT, DATED 21ST APRIL, 1922.

An agreement made this 21st day of April, 1922, between the South Indian Railway Company, Limited, hereinafter called "the Administration" of the one part, and the Chairman, Municipal Council, Chidambaram, hereinafter called "the Licensee" of the other part.

Whereby it is agreed as follows :—

1. The licensee shall have the use of the piece of land described in the schedule hereto for the purpose of receiving and storing thereon coal imported by Railway (inwards) subject to such rules, regulations and by-laws as may from time to time be made by or on behalf of the Administration, or on behalf of any local authority, in relation to the transport, discharge and storage of and subject to the conditions hereinafter contained.

2. The licensee shall not construct or put up any building, erection or convenience on the said land.

3. The licensee shall not use the said land for transporting, discharging or storing any other goods than his own.

4. The licensee shall allow the General Traffic Manager for the time being of the Administration (hereinafter referred to as the Manager) or any one authorised by him in this behalf free access at all times to the said land.

5. The licensee shall pay a deposit of Rs. 10 per plot of 100 ft. by 25 ft. as a guarantee for the due and faithful performance of this license and the said deposit shall be returned to the licensee on the termination of this license, less any amount that may be found due to the Administration.

6. The licensee shall from the 1st day of March, 1922, pay to the Administration a rent of Rs. 7-8-0 per month or part of a month per plot of 100 ft.

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by 25 ft. which shall be paid in advance on or before the 1st day of the month for which the same shall become due.

7. The licensee shall, without notice from the Administration, forfeit the entire deposit money referred to in cl. 5 hereof on his making default in complying with the terms in cl. 6 hereof, and his license shall be deemed cancelled and revoked as and from the 15th day of the month for which the rent became due and was not duly paid by him.

8. The licensee shall not remove from the said plot of land and of his goods stored thereon until all his dues to the Administration have been duly paid, and the said goods shall be liable to wharfage from the date of the cancellation of the license referred to in cl. 7 hereof, such wharfage being calculated as per scale laid down in the Goods Tariff published by the Administration from time to time.

9. The Administration shall, of their mere motion and without an order from a Court of Law, after the expiry of fifteen days' written notice to the licensee, have the right to sell by auction the goods of the licensee stored on the said plot or piece of land for the purpose of recovering all charges due to the Administration by the said licensee, the surplus of the sale proceeds, if any, being rendered to the licensee.

10. The licensee shall not transfer or sub-let the privileges mentioned in cl. 1 hereof without the consent in writing of the said Manager.

11. The said privileges in cl. 1 hereof are granted on the express understanding that either party may be at liberty to determine and put an end to this license by giving to the other of them at any time 15 days' notice in writing, and such privileges may be so determined by the Administration without any claim for compensation whatever on the part of the licensee, and on the expiration of such notice, the licensee shall discontinue to use and shall yield up to the Administration the said plot or piece of land.

12. Nothing herein contained shall be construed to create a tenancy in favour of the licensee of the said land and the Administration may of their mere motion upon the determination of this license re-enter upon and re-take and absolutely retain possession of the said land.

13. The licensee shall at all times keep the Administration indemnified against, and shall re-imburse to the Administration all claims, demands, suits, losses, damages, costs, charges and expenses whatsoever which the Administration may sustain or incur by reason or in consequence of any injury to any person or to any property resulting directly or indirectly from the combustion or otherwise of the coal kept or placed by the licensee upon the said land or by the reason or in consequence of the non-observance or non-compliance on the part of the licensee with any rule, regulation or by-law referred to in cl. 1 hereof.

14. The licensee shall pay all the costs of the stamping and execution of this license.

As witness the signature of the parties hereto the day and year first above written.

(Sd.) B. C. SCOTT,
Agent, S. I. Ry.

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The Government Pleader on behalf of the petitioner-referencer.

S. S. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*The Officiating Chief Justice* :—This is a reference made to us by the Board of Revenue under S. 57 of the Stamp Act, and the question we are called upon to decide is whether certain documents entered into between the South Indian Railway Company and certain coal merchants, by which the latter are given leave to stack coal on small plots of land measuring 100 feet by 25 feet in station yards, are required to be stamped as leases under Art. 30 of Sch. I-A, or whether they are mere licenses which fall within the description of agreements not otherwise provided for under Art. 4 (*c*).

Ordinarily a lease is a grant of property for a time by one who has a greater interest in the property, the consideration being usually the payment of rent. A license, on the other hand, is a permission to do some act which, without such permission, it would be unlawful to do. All the cases to which we have been referred make the distinction between a lease and a license to depend upon whether sole and exclusive occupation is given.

Now, the document in its terms contains a number of restrictions which might be consistent with the grant of a lease but which collectively indicate in my opinion that what was granted was a license. The drawer of the document was evidently anxious to avoid giving a lease so as not to contravene the instructions of the Government of India that Railway Companies have no permission to lease lands in their possession without the concurrence of the Secretary of State. Throughout the document the person who is given possession is called a "licensee," and in clause 12 there is an express provision that "nothing herein contained shall be construed to create a tenancy in favour of the licensee." The fact that certain clauses of the agreement impose conditions which would be ordinarily implied by the grant of a license but would be exceptions to the grant of a lease, does not necessarily indicate that it is a lease. These clauses were probably inserted *ex abundante cautela* ; for instance, under clause 4 "The licensee shall allow the General Traffic Manager . . . or any one authorised by him in this behalf free access at all

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times to the said land." Clause 1 makes the use of the land subject to any regulations or by-laws as may from time to time be passed. Under clause 2 the licensee is prohibited from erecting any building on the land. Under clause 3 he cannot allow the land to be used for any other goods but his own. Under clause 6 there is an agreement to pay rent, but that of itself will not make the document a lease. It is simply a misuse of the term to call it "rent" instead of "fees" if it is not a lease. Cl. 10 further provides for the "privileges," as they are termed, not being transferred or sub-let without the consent of the General Traffic Manager. Cl. 11 provides for the license being revocable on 15 days' notice on either side. Finally, the document is one signed by both parties to the agreement and is not a unilateral deed. All these terms which I have quoted indicate that the merchants were not given the sole and exclusive occupation of the plots of ground upon which they were to deposit the coal.

That being so, the intention of the parties as gathered from the document is against its being construed as a demise of an interest in property. The ground put forward by the Agent of the Railway for holding that the document is a license rather than a lease, namely, that in every lease the lessor should have a legal right to lease out the land, does not affect my judgment. Even a person without a title to land may execute what purports to be a lease of that land. The test is not the right of the lessor to give the lease, but the interest intended by him to be created by the document. The fact however that the Railway Company is prohibited by orders of the Government of India from executing leases of lands in their possession is important for understanding the intention of the framer of the document as showing that the Company would be naturally averse to giving away any rights that ought to be reserved. A number of cases have been quoted before us, but the two which to my mind appear to have most bearing on the question are *Frank Warr and Co., Ltd.* v. *London County Council* (1), where the use of refreshment rooms was given by the lessees of a Theatre, and *Sweetmeat Automatic Delivery Co.* v. *Commissioners of Inland Revenue* (2), where automatic machines were placed on the platform of Railway Stations. In both these cases the permission given was held to fall short of a lease for the reason that no interest in land was given by the agreements.

1. (1904) 1 K B 713. 2. (1895) 1 Q B 484.

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Coming now to decisions of this Court, both in *Seeni Chettiar* v. *Santhanathan Chettiar* (3) and in *Mammikutti* v. *Puzhakkal Edom* (4) the test of whether a document was a lease or not was held to be whether it vested any exclusive interest in immoveable property in the transferee or whether it gave him merely a right to enter on the property and to do something thereon.

For these reasons I think we must hold that the specimen document in the reference sent to us is not a lease but is an agreement not otherwise provided for.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—I agree with my Lord. The question is whether the document which is before us is a lease or only a license. The document purports to be an agreement between the South Indian Railway Company and persons who got consignments of coal. The object of the document was to provide facilities, for the unloading of coal and for its removal from the Railway Station. Ordinarily the coal would have to be removed as soon as it arrived or within the time allowed by the Railway ; otherwise demurrage would be charged. The object of the agreement was to allow the coal to remain stacked in the Railway premises and to be removed at the convenience of the consignees. A "lease" is defined in S. 105 of the Transfer of Property Act, and a "license" is defined by S. 52 of the Easements Act. In both cases certain rights are conferred on the lessee or the licensee. In the case of a license something may be paid as consideration for allowing a person to do an act on another man's land. Both have several elements in common, but it seems to me that the difference between a lease and a license is that, in the case of a license there is no interest in immoveable property transferred to the licensee ; while in the case of a lease there is a transfer or carving out of the interest in favour of the person in whose favour the lease is granted. One chief consideration is whether there is any right of exclusive possession given. When a document is clear and unambiguous we cannot go outside its terms for the purpose of determining the stamp duty but where it is otherwise I think the question is whether, having regard to the purpose of the agreement and the terms in which it is expressed, the document can be said to confer any interest in the land on the licensees. Numerous cases have been cited on both sides, but I think the case which is most in point is the

3. (1896) I L R 20 M 58 : 6 M L J 281 (F B). 4. (1906) I L R 29 M 353.

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case reported in *Frank Warr and Co., Ltd.* v. *London County Council* (1). As observed by Romer, L. J. in that case, where a document does not amount to a demise or to a parting in respect of any portion of the premises, with the possession which the owner has when he executes the document, it would only amount to a license and not a lease. Having regard to the purpose of the document, I think that the purpose was simply to allow the consignees to store coal upon a portion of the land in the Railway compound ; and it could not have been the intention of the Railway Company to part with any interest in the property in favour of the lessee. It is important to note in this connection that, having regard to the orders of the Government of India, the Railway Company had no right to execute any lease of this property and it was with a view to protect themselves that they have inserted clause 12 in the agreement that it was not to be a lease of the property. It is no doubt true, as observed by the Privy Council in *Glenwood Lumber Company* v. *Phillips* (5) that, if the effect of the document is to give the holder an exclusive right of occupation of the land, it will be a demise of the land and that it is not a mere question of words but of substance. The mere calling a document a license would not affect the question ; but in arriving at a conclusion where the terms are not clear one has to see what the circumstances are to judge the intention of the parties. Now, the Railway Company had no power to grant a lease, and it is hardly likely that they would, with the knowledge that they had no power, try to execute a lease or do something which would be *ultra vires* so far as they are concerned. We start, therefore, with the fact that the Railway Company had no power to grant a lease. I may add here that, if they executed a document the terms of which amount to a lease, want of power would not of itself decide the question. But in considering whether the document is a lease or a license, I think it is relevant to consider what the rights of the parties were and what the object of the agreement was. On both these points I think the considerations weigh in favour of the view taken by the Railway Company that they only intended to grant a license and never intended to part with possession of the piece of land in the Railway compound. My Lord has referred to the various terms of the document. I agree with him in thinking that some of those clauses were put in by way

1. (1904) 1 K B 713. 5. (1904) A C 405.

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of abundant caution, and that the Railway Company did not intend to give up possession or part with possession of the property. I think clause 1 is a very important clause. It expressly reserved to the Railway Company a great measure of control as regards the transport, discharge and storage of the coal. It may be that the mere fact that they are restrictive covenants would not by itself make a lease a license if the other terms are clear, but in considering what the intention of the parties was, it is relevant to see what control the one party has over the property on which another party is allowed to do certain things. Here I think the Railway Company reserved to itself a very large measure of control; and, reading the document as a whole, I think it is merely a license given to the grantees to keep the coal on the Railway premises for some time and to pay for the privilege which they have got.

I would answer the question by saying that the document is not a lease but would come under Art. 4 (*c*) as an agreement not otherwise provided for.

Krishnan, J.

Krishnan, J. :—In this case we have been called upon to express our opinion as to what the proper stamps are on three documents which have been referred to us by the Revenue Board. They are all more or less similar in terms ; one of them alone has been printed and placed before us ; it is the document executed by the South Indian Railway Company to the Chairman, Municipal Council, Chidambaram.

It is contended by the Railway Company that the document in question amounts only to a license and falls under Sch. I-A, Art. 4 (*c*) and need be stamped only as an "agreement not otherwise provided for" under the Act. On the other hand, it is contended for the Revenue Board by the learned Government Pleader that the document amounts to a lease and should be stamped as such under Art. 30 of the same schedule. The question we have to decide is which view is correct.

The document is certainly drawn up in terms as a license. It throughout speaks of the grantee under it as a "licensee." But I agree that the question is not a question merely of words but of substance and that parties cannot by the mere use of a term of art alter the truth as pointed out by Hamilton, J., in *Young and Co.* v. *Liverpool Assessment Committee* (6). We have, therefore, to look at the substance of the arrangement

6. (1911) II K. B. 195.

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between the parties and decide under what article the document really falls. I do not think that we should go outside the language of the document in deciding what the proper stamp is or pay any attention to the circumstances under which it was executed or to the authority of the grantor. We are not concerned with the title of the grantor, but we should decide the case with reference solely to the language of the document. That is my view. But taking that view I am glad to find myself in agreement with the learned Chief Justice and my learned brother in thinking that this document really amounts only to a license and does not go far enough to be held to be a lease. There is an express clause in para. 12 of the document which says, " Nothing herein contained shall be construed to create a tenancy in favour of the licensee of the said land." Is there anything in the document which would lead us to throw overboard that statement and hold that the document is still, by its character and by the terms agreed to between the parties under it, a lease ? What it purports to give to the grantee, as I read it, is a right to stack coal on a plot of land in the station yard to be pointed out by the Railway Company; for though it refers to a schedule as describing the piece of land dealt with, no schedule is produced. It gives the right to the grantee to use the piece of land for the purpose of storing or stacking coal which he gets for his own use. His right to do that is itself subject to the rules, by-laws and regulations that the Railway Company may make from time to time as regards transport, discharge and storage of the coal—*see* para. 1. There is no particular plot of land whose possession can be insisted upon by the grantee, so far as I can gather from the document, for he is entitled to get such plot of land as the Railway Company may point out for the storage of coal, and for that it is provided that he is to pay a certain consideration, namely, at the rate of Rs. 7-8-0 a month for a plot which is 100 feet by 25 feet in extent. He has also to pay a deposit of Rs. 10 for such a plot as a guarantee that he would perform his part of the contract properly. He may take one such plot or more than one, the rate being as stated above. Either party is given power to cancel the arrangement by 15 days' notice. This is clearly merely a license, no interest being given in the land itself except to the right of a limited user of it.

The learned Government Pleader has referred to certain terms of the document as supporting him in his argument that

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it is a lease. The first point he urged was that in clause 4 there was a special provision put in which said that "the licensee should allow the General Traffic Manager for the time being or any one authorised by him in this behalf free access at all times to the said land." He argues that, if the grantee was a mere licensee, there is no necessity for such a provision at all because it is always open to a licensor to have access, possession being with him and not transferred to the licensee under the law. This may be so, but, as observed by the learned Chief Justice, this provision might have been put in merely by way of abundant caution so that no dispute might arise in the future when the Railway authorities require the land.

The next point referred to by the learned Government Pleader was the use of the word " rent " in clause 6. No doubt, that is not a happy word to have been used if the transaction was a license; the proper word would have been " fee." But I do not think that we can draw any inference from the careless use of the word " rent ;" for if it was used to connote a lease as argued by the learned Government Pleader, cl. 12 of the document which expressly says, " Nothing herein contained shall be construed to create a tenancy in favour of the licensee" contradicts it.

The next point taken by the learned Government Pleader was with reference to the wording in cl. 10 of the document. It says, " The licensee shall not transfer or sub-let the privileges mentioned in clause 1 without the consent in writing of the said Manager." Here again, no doubt, it is an unnecessary provision altogether if the arrangement is to be treated as a license, for a licensee has no power under the law of transferring his privileges unless it is given to him by contract. Here again one may well accept the explanation given by the Railway Company that it was put in to avoid all disputes in the future.

The strongest point in the learned Government Pleader's favour is what is stated in clause 12 which says that " upon the determination of the license the Administration may of their mere motion *re-enter* upon and *re-take* and absolutely retain *possession* of the said land." This would seem to indicate that possession had been given ; but, as a matter of fact, no legal possession was intended to be given at all. The only right that the transferee was intended to have was the right to go upon this land to stack coal and nothing more. In fact,

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it seems to me that there is nothing in the document to prevent the Railway Company from changing, from time to time, the plot which the grantee was to have if the Railway Company desired it. When that is so, it seems to me that this case is very near the case of *Sweetmeat Automatic Delivery Co.* v. *Commissioners of Inland Revenue* (2). There is really no lease of any particular plot of land at all but only a license or permission granted to the grantee to store coal on a plot pointed out by the Railway Company. I have no doubt whatever that this is a case of a mere license and not of a lease. In this connection the case in *Frank Warr and Co., Ltd.* v. *London County Council* (1) may also be consulted. There it was held by their Lordships that the use of certain rooms for the purpose of storing wine, etc., by the persons to whom the exclusive right of selling refreshments in a theatre was given did not give them a lease at all but only a license, as the right to sell refreshments itself was a license. The principles enunciated there might well be applied here. There are two cases in our High Court in *Seeni Chettiar* v. *Santhanathan Chettiar* (3) and *Mammikutti* v. *Puzhakkal Edom* (4) where the points of difference between a lease and a license had to be considered. In both these cases it was held that the right to cut and enjoy timber on a certain land did not amount to a lease but was only a license.

Since the transaction in this case did not amount, in my view, to a lease, the only Article under which the document before us can fall is Art. 4 (*c*) of Sch. I-A. It is true that there is no definition of the word "lease" in the Stamp Act as it contends itself with saying in S. 2, cl. (16), what a lease includes. It includes among other things, (*b*) a kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy, or pay or deliver rent for immoveable property ; but there is no definition of the word "lease." The present document cannot be brought under cl. (*b*) either as we cannot say that it is an "undertaking in writing to occupy, or pay or deliver rent for immoveable property." Although the document uses the word "rent," it is not used in the same sense as it is used in the statute. In the statute it is clearly used as meaning rent as defined in the Transfer of Property Act, *i. e.*, as something which a tenant is bound

1. (1904) 1 K B 713. 2. (1895) 1 Q B 484 at 488.
3. (1896) I L R 20 M 58 : 6 M L J 281 (F B).
4. (1906) I L R 29 M 353.

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to pay to a landlord. The definition of "lease" given in the Transfer of Property Act is, I think, the proper definition to take in this case. The word "license" is defined in the Easements Act and we are entitled to use that definition as the proper definition of the term for the Stamp Act.

In these circumstances, I agree with my Lord the Chief Justice and my learned brother in thinking that this document cannot be brought under the term "lease" and that we should answer the reference accordingly.

A. S. V. *Reference answered.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD SUMNER, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

William Graham ... *Appellant**

v.

Krishna Chandra Dey ... *Respondent.*

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William Graham v. Krishna Chandra Dey.

Specific Relief Act, Ss. 15, 16—Scope and applicability—Contract for sale of two plots dealt with together and priced at one lump sum—Contract incapable of performance with regard to one of plots—Effect—Purchaser's rights—Specific performance of contract if can be decreed in such case.

A contract for the sale of two plots of land for one specified sum required the vendor to make out a marketable title, and, in case of failure to do so, bound him to refund the deposit on demand. It also stipulated that, in case of any deficiency in the area or quantity of land, no compensation should be payable by the vendor on actual measurement. There was no general condition either providing for compensation or excluding it. The price fixed was a price for both plots together, and, in describing the steps to be taken as to making title, granting an assurance and receiving rents and profits, both plots were dealt with together as a whole, and there was nothing by which to separate them or to place one on a footing independent of the other. In fact, if it were not for the statement of their areas and of their boundaries and locality, no separate and independent footing could be suggested or alleged to distinguish either from the other.

In a suit brought by the purchaser to enforce the contract under the Specific Relief Act, the vendor proved to be unable to make a title to the second plot. The Trial Judge offered the plaintiff a decree for the conveyance of the other plot on the terms of S. 15 of the said Act, and, as the plaintiff refused that offer, the suit was dismissed with costs. On the issue of damages for breach of the contract no evidence of material damage was given.

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*P C Appeal No. 156 of 1923. 21st November, 1924.

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On appeal, the High Court, considering that the case fell within the terms of S. 16 of the Act, allowed the appeal, but having before them no evidence of the value or character of the plots beyond the particulars given in the contract, remitted the case to the Trial Judge in order that he might take evidence and assess the abatement of price to be allowed in respect of the failure to make title to one of the plots.

Held, reversing the High Court and affirming the Trial Judge, that to call the parties to give further evidence on remand was to try to make them agree on a new price, subject to settlement by the Trial Judge, if they differed.

Privy Council—Appeal—Costs of, and in Courts below—Disallowance of, to successful party.

In view of the fact that the defence was singularly devoid of merit and of the defendant's conduct throughout, their Lordships directed that there ought to be no costs of the appeal to them on either side or of the proceedings in the Courts below.

Specific Relief Act, Ss. 14 to 17—Exhaustive of cases in which specific performance can be decreed—English Law—Resort to—Permissibility.

Ss. 14 to 17 inclusive of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete Code, within the terms of which relief by way of specific performance must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the sections must ultimately prevail.

Specific Relief Act, S. 16—Applicability—Conditions.

To make S. 16 of the Specific Relief Act applicable it has to be shown that there was a part of the contract, to wit, that relating to plot B, which, (*a*) "taken by itself could and ought to be specifically performed," and (*b*) "stood on a separate and independent footing" from the other part of the contract, which admittedly could not be performed. Before a Court can exercise the power given by the section it must have before it some material tending to establish these propositions, and cannot apply the section on a mere surmise that, if opportunity were given for further enquiry, such material might be forthcoming and possibly might be found to be sufficient; and the words of the section, wide as they are, do not authorise the Court to take action otherwise than judicially, and in particular do not permit it to make for the parties or to enforce upon them a contract, which in substance they have not already made for themselves.

Appeal from a decree of the High Court (26th March, 1923) which set aside an original decree of the Subordinate Judge, Alipore (27th November, 1920), dismissing the suit.

An agreement made the 15th September, 1919 between William Croyton Graham (appellant) as the vendor and Krishna Chandra Dey (respondent) as the purchaser provided as follows :—

"(1) The vendor agrees to sell and the purchaser agrees to purchase the hereditaments and premises described in the schedule hereto with their appurnances and the inheritance thereof in fee simple in possession free from encum-

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brances at the price of Rs. 1,53,000, to be paid as follows, that is to say, the sum of Rs. 501 as deposit and by way of earnest immediately after the signing of this agreement and the residue thereof on the completion of the purchase.

(2) The purchase shall be completed within 14 days from the date of delivery of title-deeds to the purchaser or his Solicitor as hereinafter mentioned at the office of Messrs. Leslie and Hinds, the vendor's Solicitors, and the purchaser shall then have possession of the said premises, all outgoings up to that time being cleared by the vendor. The rents and profits will be received by the vendor up to the date of completion of the purchase from which time the rents and profits shall belong to the purchaser and the outgoings shall be discharged by him and for the purpose of this agreement the rents, profits and outgoings shall, if necessary, be apportioned.

(3) The vendor shall, within two days from the date hereof, deliver to the purchaser's Solicitor all title-deeds relating to the said hereditaments and premises for approval on behalf of the purchaser.

(4) All objections and requisitions in respect of the title or anything appearing therein or in this agreement shall be stated in writing and sent to the vendor or his Solicitor within five days from the delivery of the title-deeds. If any requisition is made as aforesaid, its reply shall be sent by the vendor or his Solicitors within five days from the date of receipt of such requisition.

(5) The vendor shall be bound to make out a marketable title to the said hereditaments and premises, and in case of failure so to do, the vendor shall on demand refund to the purchaser the said deposit without interest.

(6) On the vendor making out such title as aforesaid the vendor shall upon receipt of the balance of the purchase-money at the time and in manner aforesaid make and execute to the purchaser or such person as he may direct, a proper assurance of the said hereditaments and premises, such assurance to be prepared by and at the expense of the purchaser and the vendor shall cause all necessary parties to join therein.

(7) If the purchaser fails to complete the purchase within the time hereinbefore mentioned, the vendor shall have full power to cancel this agreement by giving notice thereof in writing to the purchaser or his Solicitor, and the said deposit money shall in that case be absolutely forfeited to the vendor, whose other rights, including his right to sue the purchaser for specific performance of this contract, shall, notwithstanding anything hereinbefore contained, remain absolutely unaffected.

(8) If the vendor fails to complete the sale, he shall pay to the purchaser all losses, damages, costs, and expenses that the purchaser may incur or be put to by reason of such failure and the purchaser's other rights, including his right to sue the vendor for specific performance of this contract, shall, notwithstanding anything hereinbefore contained, remain absolutely unaffected.

(9) The land is believed to measure about 24 1|2 bighas, and in case of any deficiency in the area or quantity, no compensation shall be payable by the vendor on actual measurement."

(Here followed the schedule describing plots A and B to be sold).

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Upon delivery of a cheque by the purchaser for Rs. 501, deposit and earnest money and receipt of the title-deeds, the following, among other requisitions on title and answers thereto were exchanged between the respective solicitors :—

" (9) It appears from the *kowala*, dated 12th July, 1904, that Mrs. Kate Graham is the owner of property comprised in parts of the Schedule to the agreement for sale. How then does the vendor propose to sell the said property ?	Mrs. Graham will concur in the sale
" (15) Who is the beneficial owner of the property ?	Mr. Graham and his wife.
" (16) Is the vendor alone competent to convey an absolute title to the property free from encumbrances ?	Yes, with the concurrence of Mrs. Graham.

The purchaser's solicitor did not consider these answers as satisfactorily establishing a good title to Lot B (one of the lots described in the Schedule to the agreement), and therefore did not submit a draft conveyance for approval or complete on the date fixed therefor, 30th September, 1919, and the vendor's solicitors thereupon gave notice cancelling the agreement and forfeiting the deposit. Eventually, on the 10th November, 1919, the purchaser filed his plaint in the Court of the Subordinate Judge of Alipore, claiming specific performance of the said agreement, and, in the alternative, refund of the earnest money with interest, and damages for breach of the agreement. On the 27th November, 1920, the Subordinate Judge (K. P. Sen, Esq.) delivered judgment in favour of the vendor mainly on the ground that, as part of the property agreed to be sold belonged to the vendor's wife, the purchaser was not, under the Specific Relief Act (I of 1877) entitled to specific performance of part of the contract ; and he directed that the cheque for Rs. 501, which had not been cashed, should be returned to the purchaser, which was done. The purchaser then appealed to the High Court of Judicature at Fort William (Ghose and Panton, JJ.), but stood over for the purchaser to inspect anew the title-deeds relating to plot B belonging to Mrs. Graham, and consider whether he would accept a decree for specific performance of such part of the contract as the vendor was able to perform upon the terms of S. 15 of the said Act. The purchaser declining to take such a decree, the appeal was then argued on the 2nd February, 1923, and, on the 20th March, 1923,

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judgment was delivered allowing the appeal with costs (reported in I. L. R. 50 Cal. 700), and remitting the case to the Subordinate Judge to take evidence and assess, in abatement of the price, the damage suffered by the purchaser through the vendor's failure to make a good title to Plot B.

The vendor appealed to His Majesty in Council.

A. M. Dunne, K. C. and *Bryan Farrer* for appellant.

The respondent was not represented.

21st November, 1924. The Judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER :—This was a purchaser's suit to enforce under the Specific Relief Act, 1877, a contract for the sale of two plots of land for one sum of Rs. 1,53,000 in the Tollygunj District of Calcutta. The contract required the vendor to make out a marketable title and, in case of failure to do so, bound him to refund the deposit on demand. It also stipulated that, in case of any deficiency in the area or quantity of land, no compensation should be payable by the vendor on actual measurement. There was no general condition either providing for compensation or excluding it. The vendor proved to be unable to make a title to the second plot and the Trial Judge, having offered the plaintiff a decree for the conveyance of the other plot on the terms of S. 15, which offer was refused, dismissed the suit without costs. On the issue of damages for breach of the contract no evidence of material damage was given.

On appeal the High Court, considering that the case fell within the terms of S. 16, allowed the appeal but, having before them no evidence of the value or character of the plots beyond the particulars given in the contract, remitted the case to the Trial Judge, in order that he might take evidence and assess the abatement of price to be allowed in respect of the failure to make title to one of the plots.

Ss. 14 to 17 inclusive of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete code, within the terms of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the sections must ultimately prevail.

S. 17 prescribes that there shall be no grant of specific performance except in cases coming within one or other of the

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three previous sections. It was not proved that the part of the contract which was left unperformed bore only a small proportion in value to the whole within S. 14, and the purchaser had declined to accept relief on the terms of S. 15. Accordingly, S. 16 (which appears to be novel in the width of the power which it confers) afforded the only ground on which the Court could help him. To make this section applicable it had to be shown that there was a part of the contract, to wit, that relating to plot B, which (*a*) "taken by itself could and ought to be specifically performed," and (*b*) "stood on a separate and independent footing" from the other part of the contract, which admittedly could not be performed.

Their Lordships think (1) that before a Court can exercise the power given by S. 16 it must have before it some material tending to establish these propositions, and cannot apply the section on a mere surmise that, if opportunity were given for further enquiry, such material might be forthcoming and possibly might be found to be sufficient; and (2) that the words of the section, wide as they are, do not authorise the Court to take action otherwise than judicially, and in particular do not permit it to make for the parties or to enforce upon them a contract, which in substance they have not already made for themselves.

When the whole contract is enforced in one way or another, as to the greater part by the remedy of specific performance and as to a small residue by compensation it is not necessarily making a new contract to select from among the remedies, which the Court can grant, one for the major and another for the minor part of the contract. For this jurisdiction S. 14 specifically provides and S. 17 forbids any extension beyond it. Hence S. 16, both because it must be something not covered by S. 14 and because no Court can act unjudicially without either statutory warrant or consensual authority, must be limited and the expression "stands on a separate and independent footing" points to a limitation, which would exclude any new bargain, that cannot be said to be contained in the old one.

In the present case the contract states that the plots are in the same district, are of about the same area, are both equipped with tanks but otherwise are without specific description, and are both so delimited that they can be said to be bounded by such and such roads or properties on the north, south, east and west. The price, however, is a price for both together and, in describing the steps to be taken as to making title,

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granting an assurance, and receiving rents and profits, both plots are dealt with together as a whole, and there is nothing by which to separate them or to place one on a footing independent of the other. In fact, if it were not for the statement of their areas, which are cautiously stated not to be guaranteed, and of their boundaries and locality, no separate and independent footing could be suggested or alleged to distinguish either from the other. It may be that in the estimation of the parties at the time of the agreement one was more valuable than the other, bigha for bigha, or one was made more valuable than it would otherwise have been by the simultaneous acquisition of the other, apart from their respective areas. Nothing is stated about the quality or amenities of the land. It may be that, because both were sold together, the total price was less than the aggregate prices would have been, if both had been sold apart. To call the parties to give further evidence now is to try to make them agree on a new price, subject to settlement by the Trial Judge, if they differ ; it is, in fact, to impose on them an arbitration, to which they have not submitted. To resort to expert evidence is to inquire what they ought to have agreed upon, though the fact is that, left to themselves, they did not choose to do so. To remand the case to the Trial Judge is to delegate to him a discretionary decision, which rested with the High Court itself in the view which it took of the appeal. Their Lordships are, therefore, of opinion that the judgment of the High Court cannot stand and that the judgment dismissing the suit should be restored.

The Trial Judge gave the successful defendant no costs. The defence was singularly devoid of merit. The vendor, a barrister-at-law, owned only one of the two plots, which he agreed to sell, the other, as he must have known, belonging to his wife, and the assurance, which he subsequently gave upon a requisition on title, that his wife would concur, was somehow falsified. He then set up an affirmative defence, that time was of the essence of the contract, which failed at the trial, and has since been abandoned. Their Lordships accordingly think that there ought to be no costs now on either side, either of the appeal or of the proceedings in the Courts below, and they will humbly advise His Majesty to the above effect.

Solicitors for appellant : *Watkins and Hunter.*

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE JACKSON.

Kuppachi Ragavaiya ... *Appellant** (*Respondent*)

v.

Machavolu Lakshmiah ... *Respondent* (*Petitioner*).

Ragavaiya v. Lakshmiah.

Guardians and Wards Act, Ss. 19 *and* 25—*Infant girl—Application by father for declaration of his right and custody of minor—Maintainability.*

On an application by the father of an infant girl whose mother is dead, it is competent to the Court to declare him the legal guardian and direct the custody of the infant to be given to him.

Satyanarayana v. *Narasaiyamma,* (1923) 18 L W 173 ; *Ibrahim Nachi* v. *Ibrahim Sahib,* (1915) I L R 39 M 609 : 30 M L J 21 referred to.

Besant v. *Narayaniah,* (1914) I L R 38 M 807 : 41 I A. 314 : 27 M L J 33 distinguished.

Appeal against the order of the District Court of Nellore dated 1st February, 1924, and made in O. P. No. 35 of 1922.

T. V. Venkatrama Aiyar for appellant.

A. Krishnaswami Aiyar and *V. Govindarajachari* for respondent.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—This appeal raises questions regarding the interpretation of Ss. 19 and 25 of the Guardians and Wards Act (VIII of 1890).

An application was made under the Guardians and Wards Act to obtain a declaration that the father of the infant in question was its legal guardian. The applicant's wife died in the house of her parents leaving a female child of 15 days old. Within six months of her death the father of the infant requested his father-in-law to hand over to him his child, but his request was refused, and thereupon the father applied to the Court that he might be declared the guardian of his minor child. The learned District Judge made an order in his favour and also directed the custody of the minor to be given to the father.

The first contention of the appellant is that the Court had no jurisdiction to make the order in question under S. 19 of the Guardians and Wards Act. The material part of the section runs thus :—

"Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor."

*A A O No. 127 of 1924. 15th September, 1924.

Ragavaiya v. Lakshmiah.

Venkata subba Rao, J.

It is argued, that inasmuch as the minor's father is living and is not found to be unfit to be guardian, the Court cannot either appoint or declare a guardian. The question is whether this is the right construction of S. 19. In this connection, I may refer to another similar clause of the same section which enacts that a Court shall not appoint or declare a guardian of the person of the minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be her guardian. The section recognises the preferential right of the husband or the father as the case may be and provides for the safeguarding of such right. It is not intended to impose a disability upon either of them but, on the contrary, the plain intention of the section is, that in the case of a married female no one other than a husband shall be appointed her guardian unless he is unfit to be such and in the case of a minor child none but the father, excepting when it is proved that he is not fit to be its guardian. We are asked to say (confining ourselves to the case of the father) that he can never be appointed or declared a guardian. This seems to me to defeat the very object of the section. When the father of the infant is found by the Court not to be unfit, it is said he is the very person that is not to be appointed or declared. The section is, in my opinion, badly drafted but the construction of the appellant, if accepted, leads to an absurdity, and the construction must, if possible, be rejected. In my opinion, the section means that if a third party applies he shall not be appointed or declared a guardian of the person of a minor whose father is living and is not unfit. If the father is the applicant, the section has no application. This is the view taken by a Bench of this Court of which I was a member in *Satyanarayana* v. *Narasaiyamma* (1), and I still think that that view is correct.

S. 7 runs thus :—

"(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made (*a*) appointing a guardian of his person or property, or both, or (*b*) declaring a person to be such a guardian the Court may make an order accordingly."

The form of the application is prescribed by S. 10. Under these two sections the question that the Court is to put to itself is :—Is it for the welfare of the minor that its father should be declared to be the guardian of its person ? If it is, the

1. (1923) 18 L W 173.

Ragavaiya v. Lakshmiah.

Venkatasubba Rao, J.

Court may make an order. Under S. 17 in making an appointment or declaration, the Court must first and foremost have regard to the welfare of the minor. But S. 19 says by way of a rider that it shall be presumed until the contrary is shown, that the welfare of the minor requires that the father shall be the guardian of the person.

The appellant's learned vakil strongly relies upon a passage in the judgment of their Lordships of the Judicial Committee in *Besant* v. *Narayaniah* (2). The sentence relied upon is this :—" And further no order declaring a guardian should by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case. " The judgment of the Privy Council was based on three grounds :—(1) The District Court of Chingleput in which the suit was instituted had no jurisdiction. The High Court in dealing with suits transferred to it, possessing only such powers as the District Court possessed, had therefore also no jurisdiction. (2) A suit *inter partes* is not the form of procedure prescribed by the Act. The suit was therefore incompetent. (3) The relief asked for was a mandatory order directing the defendant to take possession of the persons of the infants in England, bring them to India and hand them over to their father. Any attempt on the part of the defendant to comply with this order, if resisted by the infants, would have been contrary to the Law of England and no Court ought to make an order which might lead to this consequence.

It is on these grounds that the decision of the High Court in the *Besant case* (2) was set aside. The Judge on the Original Side not only gave judgment for the plaintiff, but for the purpose of making the judgment effective, appointed the plaintiff guardian of his sons. When the Privy Council set aside the judgment, everything that followed on the judgment was necessarily vacated. Their Lordships were not dealing with the propriety of the order appointing the plaintiff as the guardian. The observation, therefore, relied on its *obiter*, and in the absence of any indication in the judgment that their Lordships gave a considered opinion on the question, I am not prepared to hold that they intended to decide finally the meaning of S. 19. It is significant that in the

2. (1914) I L R 38 M 807 : 41 I A 314 : 27 M L J 30

Ragavaiya v. Lakshmiah.

Venkatasubba Rao, J.

headnote to the report of the case it is not stated that this was one of the points decided.

On my construction of S. 19 the District Judge's decision is correct.

The respondent has endeavoured to support the judgment also by reference to S. 25 of the Act.

It runs thus :—

"25 (1). If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian."

In this case the ward did not leave nor was it removed from the custody of its father and therefore it is contended by the appellant that this section does not apply. In *Utma Kuar* v. *Bhagwanta Kuar* (3) and *Ibrahim Nachi* v. *Ibrahim Sahib* (4) the section was held to apply in similar cases on the footing that although the lawful guardian did not have previously actual physical custody it should be deemed that the minor at the time of leaving or removal was constructively in that guardian's custody and therefore he could enforce his rights under that section. Certain difficulties arise from obvious defects in the Act and one kind of difficulty was overcome in *Utma Kuar* v. *Bhagwanta Kuar* (3) and another kind of difficulty in *Ibrahim Nachi* v. *Ibrahim Sahib* (4) by the Courts placing this construction upon S. 25.

I respectfully follow these decisions and hold that, as I am satisfied that it is for the benefit of the ward that he should be handed over to its father, S. 25 is applicable. I would however add that in the case of a father who, unless unfit, is the proper guardian under the Act, a resort to S. 25 may be attended in some cases with inconvenience as he has to prove affirmatively that it is for the welfare of the ward to be given into his custody : whereas if it is held that my interpretation of S. 19 is correct, he is placed on a more secure footing.

On the merits also, I am against the appellant. Nothing has been alleged or proved against the father, the only allegation being that his wife's relations are in a more prosperous state than himself.

3. (1915) I L R 37 A 515. 4. (1915) I L R 39 M 608 : 30 M L J 21.

Ragavaiya
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—
Jackson, J.

For these reasons I would dismiss the appeal with costs.

Jackson, J. :—I have had the advantage of reading my learned brother's judgment and agree that the respondent can support the lower Court's judgment by reference to S. 25, Act VIII of 1890. As stated by Sadasiva Aiyar, J. in *Ibrahim Nachi* v. *Ibrahim Sahib* (4) a ward who was never in the actual custody or charge of his father may be deemed to be removed from his custody when the person in actual possession repudiates to the father's knowledge the right of the father to the actual custody of the minor.

Whether the dictum in *Besant* v. *Narayaniah* (2) is *obiter* or otherwise, I think it expresses the plain meaning of the statute and under S. 19 the Court is not authorised to declare anybody not even the father as guardian of the person of a minor whose father is living and in the opinion of the Court is not unfit (subject to the provisions with respect to European subjects). Whether this was the intention of the legislature or whether a contrary intention has been defeated by defective drafting I am not prepared to say.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Meenatchi Ammal ... *Petitioner** (*Counter-petitioner*)

v.

Karuppanna Pillai *alias* Muthuswami Pillai ... *Respondent* (*Petitioner*).

Meenatchi
Ammal
v.
Karuppanna
Pillai.

Criminal Procedure Code, Ss. 488 and 489—Order for maintenance of minor daughter—Liability of father after marriage of his daughter.

The mere fact that a minor daughter for whose maintenance an order had been made against her father under S. 488, Criminal Procedure Code, has subsequently married does not entitle the Magistrate to cancel the order. The order of cancellation would be proper only if the Magistrate finds that the girl's husband is able and willing to support her.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Dindigul in Proceedings, dated 6th February, 1924, in M. C. No. 6 of 1924.

T. S. Srinivasa Rao for petitioner.

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*Cr R C No. 336 of 1924
(Cr R P No. 280 of 1924). 29th October, 1924.

2. (1914) I L R 38 M 807 : 41 I A 314 : 27 M L J 30.
4. (1915) I L R 39 M 608 at 612 : 30 M L J 21.

Meenatchi Ammal v. Karuppanna Pillai.

The Public Prosecutor on behalf of the Crown.

T. Nallasivan Pillai for respondent.

The Court made the following

ORDER :—In this case a rather important question has been raised under Chapter 36 of the Criminal Procedure Code with reference to the maintenance of a child. The petitioner was the mother of two children, a girl who is now aged about 14 and a boy of 10 years. When they were younger she had obtained from the Magistrate an order for their maintenance from their illegitimate father, the counter-petitioner, at the rate of Rs. 10 a month. The girl has been recently married ; but it is not clear whether she has joined her husband or not. On the application of the father the Magistrate has reduced the maintenance given previously to a sum of Rs. 6 for the boy alone cancelling altogether the maintenance allowed to the girl. He does not give any reasons for his order but merely says, " the girl is not now entitled to maintenance. " I take it that his view is, that as the girl is married she is no longer entitled to maintenance. The question is whether this is correct. A similar question arose once before in this Court in the case reported in 2 Weir 650 ; but their Lordships did not give any definite ruling on it as they were able to rely upon an express undertaking by the husband of the child to maintain his wife, to justify the cancellation of the maintenance. It seems to me that the question really turns upon whether the altered circumstances are such that the child has become able to maintain herself. If she has become able to maintain herself by reason of her marriage and ceased to depend on the original maintenance, I would be prepared to hold that the cancellation under S. 489 of the Criminal Procedure Code would be the proper order to make ; but if in spite of her marriage if the girl still remains unable to maintain herself either because her husband is too poor to maintain her or for any other good reason, the father's liability to maintain the child would still exist under S. 488. This case, therefore, must be considered from that point of view. The Magistrate should enquire and find out whether the husband is able to maintain the girl and whether she has, therefore, ceased to be under the difficulty of being unable to maintain herself. If she has, then the Magistrate's order would be right. But, if the Magistrate finds that the girl is still unable to maintain herself, the order of cancellation will not be right.

Meenatchi Ammal v. Karuppanna Pillai.

I, therefore, set aside the order of the Magistrate and send the case back to him for passing fresh orders in the light of the above observations.

It was contended that under S. 489 the Magistrate could not altogether cancel the order of maintenance but could only alter it or reduce it. I do not think the word "alter" is used in any such restricted meaning. The reduction of the maintenance to nothing would also come within the meaning of the word "alteration." I therefore reject that argument.

The counter-petitioner will pay the costs of this petition to the petitioner.

A. V. V. — *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Sudalaimuthu Thevan (dead) and others ... *Appellants** (*Plaintiff and his L. Rs.*)

v.

Sappani Thevar ... *Respondent* (*Defendant*).

Sudalaimuthu Thevan v. Sappani Thevar.

Limitation Act, Arts. 139 *and* 144—*Suit for possession against representatives of deceased tenant—Limitation.*

A suit against the representatives of a tenant after the termination of the tenancy to recover the property leased is governed by Art. 139 and not by Art. 144 of the Limitation Act.

Subraveti Ramiah v. Gundala Ramanna, I L R 33 M 260 followed.

Second Appeal against the decree of the Court of the Additional Subordinate Judge, Tinnevelly, in A. S. No. 215 of 1921 (A. S. No. 299 of 1921, District Court, Tinnevelly), preferred against the decree of the Court of the District Munsif of Tinnevelly in O. S. No. 606 of 1918.

A. C. Shanmuga Nainar for appellants.

N. A. Krishna Aiyar and *K. Venkateswara Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff claims the suit property as his and seeks to recover it from the defendant. The original owner was one Palavesam Asari and the defendant's father was his tenant in respect of the suit property. Palavesam Asari having died, his sisters took possession of his estate and got the defendant's father to execute in their favour Ex. B, dated 23rd September, 1899, which is described as a lease deed. The lease was for three years and, under S. 3 of the Transfer of Property Act, it became determined by

*S A No. 1530 of 1922. 23rd October, 1924.

Sudalai-muthu Thevan v Sappani Thevar.

efflux of time in the year 1902. After the death of Palavesam Asari's sisters their children executed a deed of sale in favour of the plaintiff.

The short question to be decided is, is the suit in time? After the determination of the lease in 1902 no new tenancy was created, because neither the lessor nor his legal representatives assented to the lessee continuing in possession. Under S. 116 of the Transfer of Property Act, if a lessee remains in possession after the determination of the lease and the lessor accepts rent from the lessee or otherwise assents to his continuing in possession, the lease is renewed from year to year or from month to month, according to the purpose for which the property was originally leased. No new tenancy having therefore been created, the Article directly applicable is Art. 139 of the Limitation Act. It runs thus :—" By a landlord to recover possession from a tenant, 12 years, when the tenancy is determined. " The suit was instituted about 16 years after the determination of the tenancy, and therefore, the plaintiff is bound to fail. But it has been argued before me by his learned vakil that Art. 139 does not apply to suits brought against the representatives of the original tenant. In *Subraveti Ramiah* v. *Gundala Ramanna* (1) it was distinctly held that a suit against the representatives of a tenant after the determination of the tenancy to recover the property leased is governed by Art. 139 and not by Art. 144. An earlier decision in *Vedapalli Narasimham* v. *Dronamraju Seetharamamurthi* (2) was dissented from by the Bench of the Judges who decided *Subraveti Ramiah* v. *Gundala Ramanna* (1). I am prepared to follow the later decision as my own view coincides with the view of the learned Judges who decided it. It is unnecessary to state my reasons, because I generally agree with the observations made in *Subraveti Ramiah* v. *Gundala Ramanna* (1).

Turning to the facts of the case, I am clearly of the opinion that the present suit is a purely speculative one. After Palavesam Asari's death, his sisters sold all the property which had belonged to him excepting the suit property. So far as the suit property was concerned, the defendant's father was allowed to remain in possession of it. The defendant deposed that Palavesam Asari borrowed from the defendant's father about Rs. 70 and handed to him the title deeds of the

1. (1909) I L R 33 M 260 : 19 M L J 732.
2. (1908) I L R 31 M 163 : 18 M L J 26.

Sudalaimuthu Thevan v Sappani Thevar.

property as security for the repayment of the money. Although Ex. B was taken from the defendant's father by Palavesam Asari's sisters, the understanding appears to have been that the defendant's father was to remain in possession of the property practically as the owner of it. The subsequent conduct of the parties confirms this view. No rent was ever paid by the defendant's father nor was any demand for it made. The plaintiff in 1909 pursuaded the sons of the sisters of Palavesam Asari to execute a sale deed in his own favour of this property, but from 1909 to 1918 he took no steps to recover it from the defendant. He did not make any demand for rent ; he did not take any steps to recover the title-deeds. In my opinion, the plaintiff purchased the property on the chance of being able to recover it from the defendant knowing full well that he was in reality purchasing litigation.

The Second Appeal fails and is dismissed with costs.

A. V. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Appachi Goundan, now of unsound mind, represented by his mother Pongiammal ... *Petitioner* (Respondent)*

v.

Kuttiyammal ... *Respondent (Petitioner.)*

Appachi Goundan v Kuttiyammal.

Criminal Procedure Code, S. 488—Proceedings under—Insanity of respondent —Procedure.

A Magistrate has no power under the Criminal Procedure Code to appoint a guardian *ad litem* for a lunatic. Where in proceedings under S. 488, Criminal Procedure Code, the respondent is alleged to be a lunatic, it is the duty of the Court to hold a judicial enquiry into his sanity and put him if necessary under medical observation. If the Court finds that he is insane and incapable of understanding questions put to him and giving rational answers, it must postpone further proceedings until it is satisfied that the petitioner is capable of so understanding the proceedings.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional 1st class Magistrate of Gobichettipalayam in M. C. No. 44 of 1923 dated 15th February, 1924.

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*Cr R C No. 269 of 1924
(Cr R P No. 225 of 1924). 30th October, 1924.

Appachi Goundan v. Kutti-yammal.

K. Aravamudu Aiyangar for *T. M. Krishnaswami Aiyar* for petitioner.

The Public Prosecutor on behalf of the Crown.

P. K. Janakiram for respondent.

The Court delivered the following

ORDER :—The question that arises in this Revision Petition is one of some difficulty. The counter-petitioner claimed maintenance from the petitioner under S. 488 of the Criminal Procedure Code before the Sub-divisional Magistrate of Gobichettipalayam. It was pleaded on the petitioner's behalf that he is insane and that therefore the Divisional Magistrate ought to have followed the procedure laid down in Chapter XXXIV of the Criminal Procedure Code. The Magistrate on 9th January 1924 on a petition by the petitioner's mother apparently held the petitioner to be insane and appointed the mother as his guardian *ad litem,* but, when the case came into Court on 24th January, 1924 the Magistrate considered from his own observation of the petitioner that he was not insane or incapable of understanding the proceedings. He then, without cancelling his order appointing the mother as the guardian *ad litem,* heard the case and passed an order that the counter-petitioner was entitled to separate maintenance.

On the petitioner's behalf it is claimed that he is really insane and incapable of understanding the proceedings and that, therefore, the Magistrate's proceedings are void.

It may be pointed out at once that the Magistrate had no power under the Criminal Procedure Code to appoint a guardian *ad litem* for a lunatic. The proceedings under S. 488 may be *quasi* civil, but they are also criminal and are wholly governed by the provisions of the Criminal Procedure Code alone. The Magistrate made no sort of enquiry and got no medical opinion on the insanity of the petitioner, but, merely because petitioner " stood speechless " before him, concluded apparently that his previous information that he was insane was erroneous. Such a casual settlement of the important question whether the petitioner was insane or not indicates to my mind that the Magistrate merely thought it best to come to that conclusion because he did not know how to treat the case if he came to any other conclusion.

Clearly such a perfunctory enquiry will not do. It is the Magistrate's duty to hold a judicial enquiry into the sanity

Appachi Goundan v. Kutti-yammal.

of the petitioner, and put him if necessary under medical observation. If, as a result of that enquiry, he is satisfied that the petitioner is sane and capable of understanding the proceedings, then the matter is simple : but, if he concludes that the petitioner is insane and not capable of understanding the proceedings, the question is what is the proper procedure to be followed, and that is a matter of some difficulty. The procedure laid down in Chapter XXXIV will not strictly apply because the petitioner, under the amended S. 488, is not an "accused" person. The word "accused" used in the old S. 488 has been avoided in the new section evidently with deliberation. However the provisions of S. 464 at least are those which a Court of equity and good conscience would naturally follow : that is, if it finds that the petitioner is insane and incapable of understanding questions put to him and giving rational answers it must postpone further proceedings until it is satisfied that the petitioner is capable of so understanding the proceedings. This is all the more necessary in a maintenance case as the counter-petitioner in such a case is an important witness on his own behalf and has the right of offering terms to the petitioner therein ; and, if he cannot understand the proceedings and cannot give evidence on his own behalf, the Court is not able to hear both sides of the case and cannot therefore come to a judicial conclusion. To proceed to pass an order in such a case would have the result, for example, that, if the Court makes the order against a lunatic for maintenance and the lunatic does not obey it, he is liable to imprisonment—a result which no one can reconcile with justice, equity and good conscience.

I have emphasised above that the Court must find not only that he is a lunatic but that he is prevented by his lunacy from understanding the questions put to him and making rational answers to them. This is with regard to the provisions of S. 118 of the Indian Evidence Act.

It is true that to postpone further proceedings indefinitely postpones also the wife's prospect of relief under S. 488, but this seems to be an inevitable result of the omission of the legislature to legislate for such a case. She is not without remedy as she can sue for maintenance in the Civil Court.

I reverse the order under revision and direct the Magistrate to rehear the case in the light of the above remarks.

A. V. V. *Order set aside: Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Doraiswami Aiyar ... *Petitioner** (*Accused.*)

Doraiswami Aiyar, *In re.*

Penal Code, Ss., 507, 508, 385, 420—Offence under—Essentials of—Threat by accused that if person threatened does not pay accused money demanded from him God was going to punish him and his family with ruin and death—Offence constituted by—Attempt to cheat under Ss. 420 and 511, Indian Penal Code—Criminal Procedure Code, S. 238, cl. 2 (a)—Cheating—Charge for offence of—Conviction under Ss. 420 and 511, Indian Penal Code, of attempt to cheat—Legality—Criminal Procedure Code, S. 439, cl. (4)—Applicability—Conditions.

The accused sent two anonymous letters, Exs. A and B, by post to *J*, a Mahomedan and the son of *N*, recently deceased, purporting to come from the deity at Nagore (Nagore Andavan) directing him to pay certain sums of money to a person specified in the letters whom he was to seek out and threatening him with ruin and death from divine displeasure if he failed to do so. *J* was frightened and went to the place named with Rs. 300 and there met accused. The accused, however, denied that he was the person they were in search of and ridiculed their taking the anonymous letters seriously. *J* went away and did nothing more, whereupon the accused went to *J's* village and pretended that he had two letters, Exs. C and D, from the God at Nagore wherein he was commanded to go to *J* and explain the serious situation to him and to receive Rs. 300 from him. He also showed them the identification mark mentioned in Ex. B, a big mole on his left arm, to convince *J* that he was the man referred to. The accused was not, however, paid then and he went away. Very shortly after *J* received another letter, Ex. E, sent by the accused, saying that that was the last communication that he would receive and that dire consequences would follow without further warning. It was signed *"Andavan"* and purported to come from God Himself. On receiving that letter *J* got alarmed and sent for the accused ; in the meanwhile his (*J's*) brother-in-law had informed the police of what had happened. Accused came to *J's* house and discussed the matter with him and two others and agreed to receive Rs. 300 if offered on a silver plate with sugar and fruits. On the offer being so made accused took the notes and put the bundle under his armpit and was leaving the house when he was arrested by the police.

The Sub-divisional Magistrate convicted the accused under Ss. 420 and 507, Indian Penal Code. On appeal the Sessions Judge concurred in the findings of fact of the Court below but altered the conviction to one under Ss. 385 and 508, Indian Penal Code, holding that Ss. 420 and 507 were not the proper sections applicable on the facts.

Held, in revision, that the accused's offence did not fall under S. 507 or S. 508, or S. 385 or S. 420, Indian Penal Code, but amounted to an attempt to cheat under Ss. 420 and 511, Indian Penal Code, read together ; that by virtue of the new amendment of S. 238, Criminal Procedure Code, cl. 2 (*a*), the accused was liable to be convicted under those sections, though he had

*Cr R C No. 100 of 1924
(Cr R P No. 84 of 1924). 18th November, 1924.

Doraiswami Aiyar, *In re.*

been charged only under S. 420, Indian Penal Code, by itself ; and that as the Sessions Judge had not acquitted the accused of the offence of attempting to cheat, S. 439, cl. (4) of the Criminal Procedure Code was no bar to the accused being convicted in revision of the offence of attempting to cheat under Ss. 420 and 511, Indian Penal Code, read together.

The words of S. 503, Indian Penal Code, which defines criminal intimidation seem to imply that the threat must be one which can be put into execution by the person threatening. It is not necessary that the injury should be one to be inflicted by the offender ; it is sufficient if he can cause it to be inflicted by another, and the infliction of it could be avoided by some act or omission that the person threatening desires. The punishment by God is not one the accused could cause to be inflicted or the execution of which he could avoid.

S. 508, Indian Penal Code, requires that by some act of the offender the person warned must be led to believe that he will become or will be rendered an object of divine displeasure. Some future act on the part of the offender is necessary to make the section applicable.

The injury contemplated by S. 385, Indian Penal Code, must be one which the accused can himself inflict or cause to be inflicted. The threat that God will punish a man for some act or omission of his is not such an injury as the section refers to.

Quaere :—Whether, in a case in which it is difficult to say what the offence committed by the accused was on the facts proved, the alteration of one section into another can be said to be a case of acquittal under the former section within the meaning of S. 439, cl. (4), Criminal Procedure Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the West Tanjore Division at Tanjore in Criminal Appeal No. 34 of 1923 preferred against the judgment of the Court of the Sub-divisional 1st class Magistrate of Mannargudi in C. C. No. 59 of 1923.

T. S. Ramaswami Aiyar for petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—In this case accused was convicted by the Sub-divisional Magistrate of Mannargudi under Ss. 420 and 507, Indian Penal Code, and sentenced to rigorous imprisonment for 2 years. On appeal the Sessions Judge of West Tanjore came to the same findings of fact but altered the conviction to one under Ss. 385 and 508, Indian Penal Code, holding that Ss. 420 and 507 were not the proper sections applicable on the facts ; he also reduced the sentence to 21 months' rigorous imprisonment. In revision it is argued that on the facts found no offence has been committed by the accused under Ss. 385 and 508 as all the necessary ingredients of

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those offences are not made out ; and that in any event the Sessions Judge was wrong in convicting the accused under these sections as he had not been charged under them and that the proper order, if any, would have been one for a re-trial.

The facts found are that the accused sent two anonymous letters, Exs. A and B, by post to one Abdul Jaffar, a well-to-do Mahomedan of Koothanallur, son of one Natharkanni Rowther, recently deceased, purporting to come from the deity at Nagore (Nagore Andavar) directing him to pay certain sums of money to a person specified in the letters whom he was to seek out and threatening him with ruin and death from divine displeasure if he failed to do so. As reference was made to the recent death of his father Natharkanni as having resulted from disobeying such warnings, Abdul Jaffar was frightened and he and his brother-in-law, P. W. 2, went to the place named with Rs. 300 and there met accused. On that occasion for some reason or other accused denied that he was the person they were in search of and ridiculed their taking the anonymous letters seriously. Seeing that Abdul Jaffar went away and did nothing more thereafter, the accused went to Koothanallur and pretended that he had two letters, Exs. C and D, from the God at Nagore, wherein he was commanded to go to Jaffar and explain the serious situation to him and to receive Rs. 300 from him. He also showed them the identification mark mentioned in Ex. B, a big mole on his left arm, to convince Jaffar that he was the man referred to. Jaffar was anxious to pay but his brother-in-law, P. W. 2, dissuaded him from doing so that day ; and the accused was not paid then and he went away. Very shortly after, Jaffar received another letter, Ex. E, found by the lower Courts to have been sent by the accused, saying that that was the last communication that he would receive and that dire consequences would follow without further warning. It was signed "*Andavan*" and purported to come from God Himself. On receiving this letter Jaffar got alarmed and sent for the accused ; in the meanwhile his brother-in-law had informed the police of what had happened. Accused came to Jaffar's house and discussed that matter with him and two others and agreed to receive three currency notes of Rs. 100 each if offered on a silver plate with sugar and fruits. On the offer being so made accused took the notes and put the bundle under his armpit and was leaving the house when he was arrested by

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the police. Jaffar seems to have been satisfied with the transaction as he thought he had thereby averted the threatened danger to him and his family.

It is on the above facts that we have to decide what offence the accused had committed. One of the sections under which the accused was convicted by the First Court is S. 507, I. P. Code. It is a kind of criminal intimidation. The offence of criminal intimidation is defined in S. 503, Indian Penal Code. The Sessions Judge was of opinion that the injury mentioned in it must be an injury to be inflicted by some act of the offender and that as here the threat was in the nature of an intimation of divine displeasure the offence did not fall under criminal intimidation. It seems to me the view that S. 507 does not apply here is correct. The threat made in this case may be shortly stated to be this :— " If you don't pay me the money demanded from you God is going to punish you and your family with ruin and death. " There is here no doubt a threat that an injury will happen to the person threatened but the words of S. 503, Indian Penal Code, which defines criminal intimidation seem to imply that the threat must be one which can be put into execution by the person threatening as the section speaks of avoiding the *execution* of the threat. I do not think it is necessary as the Sessions Judge seems to think that the injury should be one to be inflicted by the offender ; it is sufficient if he can cause it to be inflicted by another, and the infliction of it could be avoided by some act or omission that the person threatening desires. In the present case the punishment by God is not one the accused could cause to be inflicted or the execution of which he could avoid. I therefore agree with the learned Sessions Judge that the accused's offence does not amount to criminal intimidation and therefore does not fall under S. 507, Indian Penal Code.

I am also of opinion, differing from the Sessions Judge on this point that it cannot be brought under S. 508, Indian Penal Code, either. It is a very special section and its words must be carefully scrutinised. As pointed out by the learned vakil for the accused the section requires that by some act of the offender the person warned must be led to believe that he will become or will be rendered an object of divine displeasure. I was first inclined to think that the words " by some act of the offender " was to be read only with the words

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"will be rendered" immediately preceding them and not with the words "will become" but on further consideration I am satisfied that it is not a right view. The former words should be read with both the expressions "will become" and "will be rendered" as otherwise it will unduly enlarge the scope of the section as pointed out by Mr. Mayne in his commentary on the section. That some future act on the part of the offender is necessary to make the section apply is the view taken in *The Queen* v. *Sankaran* (1) ; the observations of Turner, C. J. on page 394 are particularly clear on the point. Following that ruling I must hold that the offence under S. 508, Indian Penal Code, is not made out here for it is not the case that the accused was going to do something in the future to bring divine displeasure on Jaffar.

S. 385 also does not seem to apply for the illustrations to S. 383 which defines extortion show that the injury contemplated must be one which the accused can himself inflict or cause to be inflicted. The threat that God will punish a man for some act or omission of his is not such an injury as the section refers to.

S. 420, Indian Penal Code, would, in my opinion, have applied but for the fact that the Sessions Judge finds that Jaffar was not actually deceived. This finding is open to doubt but in revision I must accept it ; it does not however exclude the possibility of considering the accused's offence as an attempt to cheat under Ss. 420 and 511, Indian Penal Code. The accused was not charged under these sections read together but only under S. 420, Indian Penal Code, by itself but the new amendment of S. 238, Criminal Procedure Code, cl. 2 (*a*), allows an accused person charged with a substantial offence to be convicted of an attempt to commit that offence without a separate charge and trial. There can be no doubt on the fatcs found in the case that the accused attempted to deceive Jaffar by making him believe that the God at Nagore had ordered him to pay money to the accused, and thereby to dishonestly induce Jaffar to pay him Rs. 300. Although on the Sessions Judge's finding that Jaffar was not actually deceived, the offence of cheating is not made out, it is clear that the attempt to cheat Jaffar on the part of the accused was complete. The accused is therefore liable to be convicted under Ss. 420 and 511, Indian Penal Code.

1. (1883) I L R 6 M 381.

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It is however argued that it is not open to me in revision to convict the accused as above stated as he was acquitted of the offence under S. 420, Indian Penal Code, by the Sessions Judge, and reliance is placed on cl. (4), S. 439, Criminal Procedure Code. It was suggested that I should send the case down to the Sessions Judge and direct him to convict. That seems to be a useless prolongation of the case but if the law requires it it must be done. In this case, however, the Sessions Judge has not considered whether the accused is guilty or not of an attempt to cheat and has not recorded any finding of acquittal on such a charge. The prohibition under cl. (4), S. 439, does not therefore apply in this case. The case is one in which it was difficult to say what the offence committed by the accused was on the facts proved. In such a case it is doubtful whether the alteration of one section into another can be said to be a case of acquittal under the former section within the meaning of cl. (4). It is not, however, necessary to decide that point in this case for the Sessions Judge has not acquitted the accused of the offence of attempting to cheat. I therefore hold that it is open to this Court to convert the conviction of the accused to one under Ss. 420 and 511, Indian Penal Code, and I convict accordingly. The sentence of 21 months' rigorous imprisonment seems to me to be unduly severe. I reduce it to six months' rigorous imprisonment.

A. S. V. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Grandhe Venkatasubbiah ... *Appellant* (Prisoner)*

Venkatasubbiah, *In re.*

Criminal Procedure Code, S. 162—Amendment—Scope of—Offence under S. 211, Indian Penal Code—Filing a false complaint—Statements made to the police during investigation—Admissibility of—Evidence Act, Ss. 6, 7 and 157.

On a trial for an offence under S. 211, Indian Penal Code, the accused was found guilty by the Sessions Judge mainly on the testimony of two police officers as to certain statements said to have been made to the police in the course of their investigation by certain persons who had either not been examined at the trial or had denied having made such statements. *Held,* that the statements made to the police were inadmissible in evidence under Ss. 6 and 7 or under S. 157 of the Evidence Act, that S. 162 of the Criminal Procedure Code,

*Cr A No. 149 of 1924. 16th October, 1924.

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as amended, could not therefore make them relevant and that the conviction must be set aside.

S. 162 of the Code of Criminal Procedure, as amended, does not prohibit the use as evidence, for any purpose admissible under the Evidence Act, of oral statements made to the police during investigation. The application of the amended section is confined, as before, to the written record but the new section gives the accused a right to have a copy of such written statement for the purpose of using it to contradict the witnesses for the prosecution.

Appeal against the order of the Court of Session of the Cuddapah Division in Case No. 5 of the Calendar for 1924.

V. L. Ethiraj and *A. S. Sivakaminathan* for appellant.

The Public Prosecutor on behalf of the Crown.

The Court made the following

Wallace, J.

JUDGMENTS :—*Wallace, J.* :—The appellant has been convicted under S. 211 of the Indian Penal Code for bringing a false complaint against five persons that they committed dacoity. The case requires detailed scrutiny as the lower Court has in my opinion admitted much evidence which was not admissible in law.

The dacoity was said to be at 3 A. M. on 1st June, 1923. Accused's complaint was that six persons waylaid him, his daughter and his son-in-law (P. W. 17), P. W. 16 being also along with them carrying a luggage bundle and that they threatened them with violence and carried off the bundle.

Eighteen witnesses were examined for the prosecution to prove the falsity of this complaint. P. Ws. 1 and 18 are formal witnesses. P. Ws. 2 and 3 are investigating Police Officers. P. W. 4 is the Village Munsif to whom the accused gave his complaint (Ex. A). P. W. 5 is a Karnam. (I shall refer to these witnesses later). P. W. 6 is a general witness to prior enmity between the present accused and those whom he charged with dacoity. P. Ws. 7 to 11 appear as those who were accused in the accused's complaint, but there is some doubt as to P. W. 11.

P. Ws. 12 and 13 are to prove an *alibi* of P. W. 11 at the time of the alleged dacoity. P. Ws. 14 and 15 say that the accused complained to them that he was beaten by Gollas or Ayyavarisetti's men. They do not say that the accused said that there was no dacoity. P. Ws. 16 and 17 deposed to the fact of there having been a dacoity and they were treated as hostile by the prosecution. They did not help the prosecution case.

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It is clear that on the prosecution side there is no direct evidence of the falsity of the complaint except that of the persons actually accused of the dacoity who deposed to their innocence. Of these P. W. 11 claims to be the person charged in the accused's complaint, Ex. A, as Podamakala Oosavadu *alias* Chinniah of Obulampet. The accused says P. W. 11 is not the man he charged. P. W. 11 gives his name in the Sessions Court as Podamakala Golla Oosavadu *alias* Chinniah Vadu of Obulampet.But it appears from the evidence of P.Ws. 12 and 13 that he was an inpatient in Rajampet Hospital on 1st June 1923, the day of the alleged dacoity and that to the Medical Officer he gave his name as Chinnavadu *tout seul** of Ellampet. He explains now that he gave his village as Ellampet because it adjoins Obulampet but obviously that is no explanation at all. Ex. A itself clearly distinguishes between the two villages and four persons named in it are said to belong to Ellampet, and the fifth to Obulampet. If it was a wrong description of P. W. 11 to say that he was of Obulampet Ex. A would hardly have made such a distinction. It is very doubtful, to say the least, if P. W. 11 is the man named in Ex. A. The only reason he can suggest for the accused associating him with the dacoits, Ayyavarisetti's men, is that he sometimes does cooly work for Ayyavarisetti. This is hardly a sufficient reason. I am not prepared to accept this evidence as helping to prove that Ex. A was false. It is significant that this *alibi* of P. W. 11 was not put forward by the Police in any record filed in this case as a reason for referring the case to the Magistrate. Nor was it put forward by the Magistrate as a reason for dismissing the complaint.

I take up now the evidence of P. Ws. 2 to 5. P. W. 2 is the head constable who investigated the dacoity. His evidence was to the effect that he examined the accused's daughter and son-in-law, P. W. 17, and that both of them said that they did not go at all with the accused and knew nothing of any dacoity. P. W. 3 is the Circle Inspector who gives similar evidence. The defence objected that S. 162, Criminal Procedure Code, prohibited the admission of this evidence but the Sessions Judge overruled the objection and allowed the statements to go in. It will be observed that the accused's daughter has not been examined at the trial, while the evidence of P. Ws. 2 and 3 as to what P. W. 17 told them was put in in chief examination, long before P. W. 17, the son-in-law, was

*French expression meaning "simply," "without more."

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examined, and therefore at a stage when it was impossible to say whether or not P. W. 17 would corroborate what the Police Officers had stated. As a matter of fact, he did not corroborate what they said. In cross-examination, P. W. 2 added to his previous statements that he enquired "some persons" who stated that "they did not hear that any dacoity took place" and that the accused told them that he had been beaten. P. W. 3 was also allowed by the Sessions Judge in chief examination to depose that he examined P. W. 16, who denied having gone with the accused. This again was elicited before P. W. 16 had been put into the witness-box. When he did go into the witness-box, he did not corroborate what the Police Officers had stated. P. Ws. 4 and 5 are examined only to corroborate the statements of P. Ws. 2 and 3 that the accused's daughter and son-in-law denied the dacoity. P. W. 5 added that they were saying that the accused was slippered.

The Sessions Judge has in his reasons for conviction strongly relied on his conclusion that "the three persons whom the accuesd stated as having been eye-witnesses to the dacoity denied all knowledge of it before the Police Officers." As pointed out already, two of these, when examined in Court, supported the accused and the third, his daughter was not examined by the prosecution at all. As the Sessions Judge has thus used as substantive evidence against the accused statements of witnesses made to the Police in the course of the Police investigation, when these witnesses have either not been examined by the prosecution at all at the trial or have denied in their evidence at the trial that they made such statements at all, the legal question arises whether these statements taken in the course of the Police investigation are admissible for such a purpose.

It is necessary first of all to consider whether the learned Sessions Judge's ruling that S. 162 of the Criminal Procedure Code as amended is not an absolute bar to their admission is correct. These are oral statements taken from witnesses in the course of Police investigation. The old S. 162, Criminal Procedure Code, was not an absolute bar to the admissibility (for certain definite purposes) of such oral statements. It has first to be considered whether the amended S. 162 is such a bar, *i. e.* whether it prohibits the "use" of such oral statements for any purpose at an inquiry or trial. I do not think

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it does, or that it goes any further in that direction than the section before amendment did, *i. e.,* the amended section does not prohibit the use as evidence (for any purposes admissible under the Indian Evidence Act) of such oral statements. It may be answered that the words "such statement" in S. 162 (1) are vague enough to include oral as well as written statements, but I think the whole design of the section implies otherwise. Both the provisos clearly apply only to written statements, so that if oral statements are wholly excluded from use by the first part of the section, the provisos do not affect that total exclusion. It would follow that on such a reading of the section an accused person would be prohibited from using in his favour oral statements favourable to himself, made in the course of Police investigation. I cannot reasonably suppose that the section was designed for such a purpose. When the sections uses the phrase "such statement" I am clear that "such" means "if reduced into writing." There are other indications to my mind that this must be so. The old S. 162 had nothing to do with statements not reduced to writing and was designed to prevent entries in police diaries from being used against an accused person. If the scope of the new section was to be so much wider than the old as to include any statement not reduced to writing, I should have expected considering the voluminous case-law that has been endeavoured to interpret the old section [see, e. g., *King-Emperor* v. *Nilakanta* (1), *Muthukumaraswami Pillai* v. *Emperor* (2), *Fanindranath Banerjee* v. *Emperor* (3) and *Emperor* v. *Hanmaraddi Bin Ramaraddi* (4) that the section, if it was to cover oral statements also, would have unequivocally stated so.

Again, the 2nd proviso uses the same words "such statement" to mean only a written record, as it is dealing with the copy of a written record to be furnished to the accused, and obviously implies that there is a statement on the record which the Court may first examine for itself before the accused is allowed to look at it. The proviso is meaningless if "such statement" means "oral statement."

Again if S. 162 had been designed now to prohibit the use of oral statements made to police officers in the course of police investigation, I should have expected an amendment of

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1. (1912) I L R 35 M 247 : 22 M L J 490.
2. (1912) I L R 35 M 397.
3. (1908) I L R 36 C 281.
4. (1914) I L R 39 B 58.

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S. 27, Indian Evidence Act. That section has always been read as a proviso to both Ss. 25 and 26. But if the above suggested reading of S. 162 is correct, clearly S. 27 can no longer have any application to S. 25, and S. 27 ought therefore, in view of the case-law on the subject, to have been amended by making it clear that it no longer applied to S. 25. I do not think this argument is met by saying that S. 27 will still allow oral statements of the nature contemplated by it to be proved, but S. 162, Criminal Procedure Code, will forbid them being *used* against the accused. There is no point in proving a fact unless it can be used after proof, and to allow facts against accused to be proved which cannot be used against him would be a procedure so fraught with danger to an accused person. Especially in a trial by jury I cannot imagine the legislature countenancing it in any way.

I conclude therefore that the application of the new S. 162 is confined, as that of the old one was, to the written record, that the new section was designed to confer on an accused person a legal right, which the old section did not give, of having a copy of such written statement for the purpose of using it to contradict the witness, and that, as regards proof and use of old statements, the law is unaltered and is as it was before. All oral statements which are previously admissible under the Indian Evidence Act, the use of which was not prohibited by the Criminal Procedure Code are still admissible and may be used.

The learned Sessions Judge was therefore, in my view, correct in holding that the amended S. 162, Criminal Procedure Code, was not a bar to the admissibility of these statements. But it appears to me that they are not admissible under the Indian Evidence Act at all, a point to which the learned Judge has not directed his attention. They are not admissible under S. 157, Indian Evidence Act, as they do not corroborate any evidence given by accused's daughter or P. Ws. 16 and 17 before the trying Court, or any evidence given by these witnesses outside the trying Court, but filed by the trying Court as evidence at the trial. S. 157, Indian Evidence Act, clearly says that the testimony to be corroborated must be testimony at the trial. [See also *Emperor* v. *Akbar Badoo* (5)]. The Public Prosecutor argues that the statements are admissible as part of the *res gestae* under Ss. 6 and 7 of the Indian Evidence Act,

5. (1910) I L R 34 B 599.

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Wallace, J.

but I am not prepared to accede to this contention. The offence in this trial is filing a false complaint. What happened at the subsequent Police investigation of the complaint forms no part of the *res gestae*. That investigation is an occurrence separate in time and place from the crime itself, and the remarks of witnesses at the investigation are not remarks occasioned by the crime and springing spontaneously out of it, but remarks made in answer to Police enquiries, which may be made long after the crime. If the investigation had ever been made, the remarks would never have been made either. All these statements by witnesses in the course of the Police investigation therefore are neither spontaneous nor simultaneous in time and place with the crime. Different considerations would arise if the statements had been made at or about the time and place of the crime, as for example, if, when the accused made his complaint, his daughter and son-in-law had been present and had then volunteered the information that the complaint was a false one. I am satisfied therefore that the Indian Evidence Act does not permit these statements to be proved or used as evidence against the accused.

I am quite clear on general principles also that these statements are not admissible as substantive evidence for the prosecution against the accused. If this case can be proved by the statements of the Police Officers that other people at a Police investigation told them that there was no dacoity, it would be equally open in another case to prove by similar statements that there was a dacoity or any other fact necessary for a conviction. Such a procedure, I am quite clear, is unwarranted either by the Indian Evidence Act or the Criminal Procedure Code. The fact that this is a case of a false complaint does not to my mind alter the general principle that criminal cases cannot be proved by reproducing the contents of the note-book of an investigating Police-officer.

I am satisfied therefore that these statements were wrongly admitted in evidence against the accused. As I have already pointed out, if they are excluded, we are left only with the self-interested statements of the original accused in the complaint which are hardly a strong enough basis for a conviction. I would therefore reverse the conviction and sentence passed on the accused and direct him to be set at liberty and his bail-bond cancelled.

Madhavan Nair, J.

Madhavan Nair, J.: —I have had the advantage of reading the judgment just now delivered by my learned brother.

As I agree with that judgment, I propose to deal with the facts and the law arising in the case only very briefly.

The accused has been convicted by the learned Sessions Judge of Cuddapah for the offence of preferring a false charge of dacoity under S. 211 of the Indian Penal Code, and has been sentenced by him to suffer rigorous imprisonment for two years.

The accused made a complaint (Ex. A), that while he was proceeding on the 1st of June, 1923, from Obulampet to Vontimitta railway station accompanied by his daughter, son-in-law, and a servant, six persons assaulted him and carried away the bundle of cloths and jewels kept in the custody of his servant. As this complaint was on investigation found to be false, the case out of which this appeal arises was launched against him under S. 211, Indian Penal Code.

It seems to me that the falsity of the complaint made by the accused depends mainly upon the evidence of P. Ws. 2 to 5. P. Ws. 7 to 11 are the persons said to have taken part in the dacoity. All of them state that they were absent from the village at the time of the occurrence. P. Ws. 12 and 13 seek to prove the plea of *alibi* set up by P. W. 11. I agree with my learned brother in holding that it is very doubtful if P. W. 11 is the man named in Ex. A. P. Ws. 16 and 17, the servant and the son-in-law of the accused, stated before the Sessions Judge that there was a dacoity and that the accused was beaten ; and the Public Prosecutor was permitted to treat them as hostile witnesses and cross-examine them. In this connection I may point out that the accused's daughter has not been examined at the trial.

The evidence of P. Ws. 2 to 5 is to the following effect : P. W. 2, the Head-constable who investigated the dacoity case, stated that he examined the accused's daughter and son-in-law and that they told him that the alleged dacoity never took place, that they did not lose any jewels or cloths, and that they did not accompany the accused to Vontimitta. P. W. 3, the Circle Inspector who also carried on the investigation of the case, stated that the daughter and the son-in-law of the accused told him that no dacoity took place. P. Ws. 4 and 5 were examined to corroborate the evidence of P. Ws. 2 and 3 that the accused's son-in-law and daughter stated that there was no dacoity. As already pointed out, P. Ws. 17 and 16, the son-in-law and the servant of the accused, did not

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corroborate what the Police-officers stated.

It has been argued by the learned counsel for the appellant (1) that the evidence of P. Ws. 2 and 3 as regards what they were told at the investigation by the daughter, the son-in-law and the servant of the accused should not have been admitted in view of the provisions of the amended S. 162 of the Code of Criminal Procedure, and (2) that, even if S. 162 is not a bar to the admissibility of their evidence, the learned Sessions Judge should have excluded the statements as inadmissible under the provisions of the Indian Evidence Act. The first objection was overruled by the learned Sessions Judge and the second was not considered by him.

The evidence of P. Ws. 2 and 3 consist of statements made to the Police by witnesses examined in the course of the investigation of the case. S. 162 of the Criminal Procedure Code before its amendment had nothing to do with statements not reduced to writing; the section did not prohibit "the use of such statements" as evidence for any purpose admissible under the Indian Evidence Act. I think, even after the amendment, the application of the section should be considered to be limited to the use of statements reduced to writing as under the old section. If this interpretation is not accepted, it would mean that the legislature, by amending S. 162 of the Code of Criminal Procedure, has virtually repealed S. 27 of the Indian Evidence Act. As, in my opinion, such a result would never have been contemplated by the legislature, I hold that the amended S. 162, Criminal Procedure Code, is not a bar to the admissibility of statements made to P. Ws. 2 and 3 by the accused's daughter and P. Ws. 16 and 17.

Though S. 162, Criminal Procedure Code, does not prohibit the use of the oral statements in question, it seems to me that the statements are not admissible in evidence under the Indian Evidence Act. It has not been argued that these statements are admissible under S. 157 of the Evidence Act, as these do not corroborate the statement of the accused's daughter and the evidence of P. Ws. 16 and 17 given at the trial; but what is contended for by the learned Public Prosecutor is this, that these statements are admissible as part of the *res gestae* under S. 6 or S. 7 of the Indian Evidence Act. It will be observed that these statements were made to P. Ws. 2 and 3 during the Police investigation of the case.

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They were made long after the commission of the offence, *viz.*, the filing of the alleged false complaint. As the statements in question are not the necessary incidents of the offence itself and are not immediately associated with it, I do no think it can be said that they form part of the *res gestae.* I have, therefore, come to the conclusion that these statements cannot be proved or used as substantive evidence in support of the charge brought against the accused.

As the other evidence in the case is not of any value, I allow the appeal and set aside the conviction and sentence passed upon the appellant. The bail-bond of the accused will be cancelled.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Veeraraghavachariar and others... *Appellants** (*Plffs.*)

v.

The Secretary of State for India in Council, represented by the Collector of Tanjore ... *Respondent in S. A. Nos.* 688 *to* 690 *of* 1921 *and* 854 *of* 1923 (*Defendant in all the cases*).

Veeraraghavachariar *v.* Secretary of State for India.

Land Acquisition Act, Ss. 3 (*f*) *and* 6 (3)—*Public purpose—What is—Acquisition of house sites for Panchamas—If a public purpose—Declaration by Government—Nature of—S.* 6 (3) *if* ultra vires—*Village site—What is.*

Acquisition of lands by the Government for the purpose of providing house sites for Panchamas is a public purpose within the meaning of the Land Acquisition Act. The Government is the proper authority for deciding what a public purpose is, and where it declares under S. 6 that any particular land is needed for a public purpose, the Municipal Courts cannot go into the question whether there is a public purpose or not. 9 Ch. App. 423 ; (1919) A. C. 646 ; 13 Bom. L. R. 1097 referred to. 39 Bom. 279 (P C) ; 32 Cal. 605 (P C) distinguished.

S. 6 (3) of the Land Acquisition Act is not *ultra vires* of the Indian Legislature as it does not take away any right of suit from the subject but merely states that the Government declaration shall be conclusive evidence of the fact. History of the clause traced.

Where a Legislature has acted within its powers, it is not open to a Municipal Court to question the legality of the provisions of the enactment passed by the Legislature. If an enactment or any provision thereof is *ultra vires* of

*S. A Nos. 688 to 690 of 1921 and 854 of 1923. 8th October, 1924.

the Legislature, it would be open to the Court to question the legality of the enactment or the provision. Status and powers of the Indian Legislature considered. 4 Cal. 172 (P C); 1 Bom. 367 (P C); 40 Cal. 391 (P C) referred to.

Village site does not mean lands reserved in a village for communal purposes but land which is reserved for being parcelled out as house sites and also the land on which houses have been built.

S. A. Nos. 688 *to* 690 *of* 1921.

Second Appeals against the decrees of the District Court of Tanjore in A. S. Nos. 398, 380 and 399 of 1919 preferred against the decrees of the Court of the District Munsif of Negapatam in O. S. Nos. 389, 387 and 388 of 1918.

S. A. No. 854 *of* 1923.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in A. S. No. 96 of 1922 preferred against the decree of the Court of the District Munsif of Shiyali in O. S. No. 109 of 1922.

K. Subramanian and *S. Muthiah Mudaliar* for appellants.

The Government Pleader for respondent.

The Court delivered the following

JUDGMENT :—*S. A. No.* 688 *of* 1921 :—The first point raised in this Second Appeal is that the acquisition of house sites for Panchamas is not a public purpose and the Court can go into the question whether it is a public purpose or not notwithstanding the notification by the Government that the acquisition was for a public purpose. The second point raised is that S. 6, cl. 3, of the Land Acquisition Act of 1894 is *ultra vires* of Indian Legislature inasmuch as the clause states that the said declaration,meaning the declaration by the Government, shall be conclusive evidence that the land is needed for public purposes or for a company as the case may be. It is convenient to consider the first two points together.

The argument of Mr. Muthiah Mudaliar for the appellant is that by enacting the provision in cl. 3 of S. 6 that the declaration shall be conclusive evidence, that the land is needed for public purposes or for a company, the Indian Legislature has taken away the right of suit by the party and that Courts are not precluded from considering whether the purpose for which the lands are acquired under the Land Acquisition Act is a public purpose or not and if it is not a public purpose the

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mere declaration by the Government that it is a public purpose would not make the acquisition legal. It is not contended on behalf of the respondent that the right of suit has been taken away by cl. 3 of S. 6. All that S. 6 (3) declares is that if the Government declares that a certain purpose for which it wants to acquire the lands is a public purpose, it shall be conclusive evidence of the fact.

The provision in S. 6 (3) that the declaration shall be conclusive evidence is not a new provision enacted in 1894. In Act XX of 1852, S. 1, there is a provision similar to this. S. 1 is in these terms :—" Whenever it shall appear to the Governor of Fort Saint George in Council that any land is needed for a public purpose, he shall make a declaration to that effect in a minute of Council and such a declaration shall be conclusive evidence that the purpose for which the land is needed is for a public purpose." A similar provision was enacted in Act VI of 1857, S. 2 :—" The Government may take any land on a simple declaration under the signature of a Secretary that it is required for public purposes." This power the Legislature had before the Government of India Act, 1858, and it cannot be said that the Indian Legislature enacted a provision that it had no power to enact before the Government of India Act of 1858. The Government of India Act conferred upon the Indian Legislature the powers which it had when the Government was under the East India Company. That being so, it cannot be said, that the provision in S. 6 (3) is *ultra vires* of the Indian Legislature.

Before discussing the cases quoted on either side, it is best to consider what has been done by the Government. The Panchamas, the farm labourers of the Tanjore District, have been living on lands belonging to the Mirasidars or owners of the lands. They had no rights to the sites on which they built their houses and they were liable to be evicted or turned out at the will and pleasure of the landlord. In order to improve the condition of the Panchamas, the Government proposed to acquire the sites and parcel them out to those who were willing to build houses on the sites. With this object the Government appointed a Deputy Collector to acquire sites in the Tanjore District. He acquired land under the provisions of the Land Acquisition Act and the plaintiff is one of those persons whose land has been acquired for house sites for the Panchamas. He has brought this suit for a declara-

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tion that the acquisition is illegal. Cl. (*f*) of S. 3 of the Land Acquisition Act defines a public purpose as including "the provision of village sites in districts in which the Local Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision." Under this clause the Government published a notification No. 317, dated 22nd May, 1895, and the District of Tanjore is one of the districts covered by the notification. I may remark in passing that the appellant contended that there was no such notification and such a notification, if it existed, should have been filed. I thought it best to have the notification on record and I directed the Government Pleader to produce the notification. He has filed a copy of the original notification marked as Ex. III. From this notification it is clear that it is customary in certain districts for the Government to provide house sites. Under that notification the acquisition of land now in dispute was made, as is clear from Ex. II. The acquisition having been made for a purpose, which the Legislature declared to be public purpose, it is not open to the Court to go into the question whether it is public purpose or not. Where the Legislature has acted within its powers, it is not open to a Municipal Court to question the legality of the provisions of the enactment passed by the Legislature. If an enactment or any provision thereof is *ultra vires* of the Legislature, it would be open to the Court to question the legality of the enactment or the provision.

The Indian Legislature is a subordinate Legislature, subordinate to the Imperial Legislature composed of the Crown, the House of Lords and the House of Commons. The Indian Legislature is governed by the provisions of the Acts of Parliament. The Government of India Act of 1858, 21 and 22 Victoria, Cap. VI, gives power to the Indian Legislature to frame laws. Under the Act of 1833, III and IV, William IV, S. 43, the Governor-General in Council was given power to make laws and regulations and to repeal, amend, or alter any laws or regulations whatever then in force or thereafter to be enforced. The Government is entitled to acquire lands for public purposes for every Sovereign authority has power to acquire private land for public purposes and has the power to frame laws for the acquisition of land. When it acts within such powers, as are given to it by the Legislature, a Municipal Court cannot question the validity of the provisions of any law which regulates the ac-

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quisition of land. In *Empress* v. *Burah* (1) their Lordships of the Privy Council observed at page 180, "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation, as large, and of the same nature, as that of Parliament itself." If it is granted that the Indian Legislature has power to frame laws for the acquisition of private lands, it must be conceded that it has power to frame provisions in the Act for the purpose of carrying out the object of the enactment. One of such provisions is that contained in cl. (*f*) of S. 3. According to that provision the doing of a certain act is declared to be a public purpose. It is not open to a Court to go behind it and say that it is not a public purpose.

Mr. Muthiah Mudaliar laid stress upon a decision in *Damodar Gordhan* v. *Deoram Kanji* (2). In that case the Privy Council held that S. 113 of the Evidence Act was *ultra vires* of the Indian Legislature. Lord Selborne at page 461 in delivering the judgment of their Lordships said with regard to S. 113 of the Evidence Act :—"The Governor-General in Council being precluded by the Act 24 and 25 Victoria, Cap. 67, S. 22 from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act, purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession." In that case their Lordships held that under the Act of Parliament the Indian Government could not by a notification hold that a portion of the territory was ceded to the Native Princes. There is nothing in the Government of India Act or in any other Act of Parliament which in any way limits the power of the Indian Legislature to frame laws for the acquisition of land and so the enactment called the Land Acquisition Act is not *ultra vires* of the Indian Legislature.

It is argued that the right of suit of party has been taken away by S. 6, cl. 3. That clause does not take away the

1. (1878) I L R 4 C 172 (P C). 2. (1876) I L R 1 Bom 367 (P C).

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right of suit of any subject. What it declares is that when the Government declares a purpose to be a public purpose it shall be conclusive evidence of that. In *Secretary of State for India* v. *Moment* (3) the Privy Council held that a certain enactment, which took away the right of a subject to file a suit to question the act of the Government was *ultra vires*. The Burma Government passed Act IV of 1898 and S. 41 provided that no Civil Court is to have jurisdiction to determine any claim on any right over land as against Government. This provision was held to be *ultra vires* of the Burma Legislature. Their Lordships held that the right of suit of a subject against the Government was preserved to him by the Act of 1858 and it was not open to the Legislature to take away the right. In this case, the right of suit is not taken away by the Legislature, but cl. 3 of S. 6 provides that a declaration that the acquisition is intended for public purposes shall be conclusive evidence of that fact. No doubt in *Hemabai Framjee* v. *Secretary of State for India* and *Moosa Hajee Hassam* v. *Secretary of State for India* (4) their Lordships of the Privy Council held that it is open to the Court to consider whether a purpose which was declared to be a public purpose by the Government was a public purpose or not. In that case the Government proposed to acquire certain lands for building houses for Government servants and wanted to resume the land which was granted under the *sanad* to the plaintiff's predecessor-in-title. The question turned upon the provisions of the *sanad* and in the course of the judgment Lord Dunedin observes at page 295 :—"*Prima facie* the Government are good judges of that. They are not absolute judges ; they cannot say *sic volo sic jubeo* but at least a Court would not easily hold them to be wrong. " That observation cannot apply to the present case, for the Legislature has declared that the acquisition of lands for village sites in certain districts is a public purpose if the Government by notification in the Official Gazette declares that it is customary for the Government to make such provision. The case in *Ezra* v. *Secretary of State for India* (5), which went on appeal to the Privy Council in *Ezra* v. *Secretary of State for India* (6), has no application to the present case. In that case the acquisi-

3. (1912) I L R 40 C 391 : 24 M L J 459 (P C).
4. (1914) I L R 39 B 279 : 28 M L J 179 (P C).
5. (1902) I L R 30 C 36.
6. (1905) I L R 32 C 605 (P C).

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tion was under Part VII of the Land Acquisition Act. Under S. 40 the Government before giving consent shall be satisfied by an enquiry held under that section of the need and public utility of the proposed work. The question there was whether the provisions of S. 40 were satisfied. It was held that the provisions of S. 40 were satisfied and that the plaintiff could not complain of the act of the Government. Here the acquisition is not under Part VII but under Ss. 6, 7, 8 and 9 of the Land Acquisition Act.

It is next urged that the purpose for which the acquisition is made is not a public purpose. Reliance is placed upon *Attorney-General* v. *Ferry* (7) and *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks* (8). Granting for argument's sake that it is open to consider whether the purpose for which the acquisition is made is a public purpose or not I do not think that these cases help the appellant much. In both cases it was held that the mere fact that the public was likely to be remotely benefited would not make the purpose a public purpose. Where the primary object is personal gain whether that be of a private individual or of a company, the public benefit resulting from the action of such a person or company is too remote, and the purpose cannot be said to be a public purpose. Every merchant and every dealer can say that he benefits the public because he is catering or providing to the wants of the public. The merchant's first object is to make a gain for himself. The benefit that he may confer upon his constituents or patrons is very remote. Such purposes are not public purposes. In the *Liskeard Union* v. *Liskeard Waterworks Co.* (9) the decision turned upon the wording of the enactment. A work-house although a charitable institution was held to be a dwelling-house within the meaning of the special enactment. It is not possible to define what a public purpose is. There can be no doubt that provision of house sites for poor people is a public purpose for it benefits a large class of people and not one or two individuals. In *Hamabai* v. *Secretary of State for India* (10) Chandavarkar, J. observed :—"There is no definition of 'public purpose' in any of our legislative enactments to afford us a clue to the meaning of the term save that in the Land Acquisition Act ; but that is a partially inclusive and not an exhaustive definition." The definition given indicates what a public purpose

7. 9 Ch App 423.
8. 11 House of Lords 443.
9. 7 Q B D 505.
10. (1911) 13 Bom L R 1097.

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is and the provision of house sites for people is a public purpose. The Government is the proper authority for deciding what a public purpose is. When the Government declares that a certain purpose is a public purpose, it must be presumed that the Government is in possession of facts which induce the Government to declare that the purpose is a public purpose. The Government are the best judges in the circumstances of what a public purpose is. In *Wijayasekara* v. *Festing* (11) their Lordships of the Privy Council observed that the decision of the Governor of Ceylon on the question whether land is needed or not for public purposes was final. Though the case was from Ceylon and in the Land Acquisition Ordinance there was no section corresponding to S. 6 cl. 3 of the Land Acquisition Act of 1894, yet, the Privy Council held that the decision of the Governor was final. This shows that the Government are the proper judges of what a public purpose is. If the Government acts within the powers conferred on it by the Legislature, it is not open to a Municipal Court to question the act. I hold that the purpose for which the acquisition was made was for public purposes within the meaning of S. 6 of the Land Acquisition Act and that the provision in cl. 3 of S. 6 that the declaration shall be conclusive evidence if the land is needed for public purposes is *intra vires* of the Indian Legislature. It was next argued that under S. 6 of the Land Acquisition Act the cost of acquisition should come out of the public revenues or some fund controlled or managed by a local authority ; otherwise the acquisition is not for a public purpose. In this case, there is no evidence that the cost of acquisition was met from the funds collected by the Land Acquisition Officer from the Panchamas. The Land Acquisition Officer, P. W. 1, stated that he collected some money from some of the Panchamas and that he deposited it with various banks and that his intention was to form co-operative societies to convey the lands to the persons who would pay for the sites. The cost of acquisition was met by the Government out of public revenue and therefore there is no substance in this contention.

It is feebly urged that there has been a contravention of the instructions of Government by the Land Acquisition Officer and therefore the acquisition of the land of the plaintiff is bad. I have not been shown any act or illegal omission which

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11. (1919) A C 646.

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would constitute a contravention of the instructions of Government on this point.

It is argued on behalf of the appellant that what was contemplated by the notification of 1895 was village sites. Mr. Muthiah Mudaliar contends that village sites mean lands reserved for communal purposes. He has referred to no authority for this position nor has referred me to any Government order or standing order of the Board of Revenue for the position that village sites mean communal lands. A village site ordinarily means the site on which the houses in a village are built. The word used in the standing order is *Gramanattam*. The Government reserve a portion of the land fit for building purposes as *gramanattam* or village sites for the purpose of enabling people to settle on such sites and build houses, and grant a portion of that site to people on application (*vide* Standing Order No. 21 of the Board of Revenue). There is a reference to *gramanattam* or village site in *Madathapu Ramayya* v. *Secretary of State for India* (12). There is also a reference in *Mahammad Meera Mohideen* v. *Secretary of State for India* (13). From the reference it is quite clear that what is spoken of as village site is not land reserved in a village for communal purposes but land which is reserved for being parcelled out as house sites and also all the lands on which houses have been built.

It is further contended that granting that the Government have power to acquire lands for village sites it is not competent for the Government to acquire particular sites of houses for the benefit of individuals. The Government instructed the Land Acquisition Officer to acquire the sites on which the houses of the Panchamas stand. It is not to benefit any particular individual that the Government have chosen to acquire sites and therefore the contention that the sites were acquired only for the benefit of individuals is not tenable.

In the result the appeal fails and is dismissed with costs. This judgment will govern the connected Second Appeals.

T S. V. *Appeal dismissed.*

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12. (1903) I L R 27 M 386 at 393. 13. (1903) 13 M L J 269 at 270.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Ratnam Pillai ... *Appellant** (*Defendant*)

v.

Kamalambal Ammal ... *Respondent* (*Plaintiff*).

Ratnam Pillai v. Kamalambal Ammal.

Transfer of Property Act, S. 91—Redemption—Right of—Mortgagor who has sold equity of redemption—Right of—Portion of consideration reserved with vendee—Effect—Contract Act, S. 74—Compensation—Default in payment of principal and interest—Enhanced rate allowed on principal only—If reasonable compensation.

A mortgagor, who subsequently parts with the equity of redemption in the mortgaged property in favour of a third party under a sale-deed which reserves part of the consideration with the vendee, is nevertheless entitled to redeem the mortgage.

In a case in which the mortgage deed provided that, if, at the end of one year from the date of the mortgage deed, there was a default of payment of both principal and interest, the mortgagee was entitled to compensation, the Courts below allowed interest at an enhanced rate of 18 per cent. per annum on the principal only. *Held,* that that was sufficient compensation for default in respect of both the principal and the interest.

Second Appeal against the decree of the Court of the Subordinate Judge of Negapatam in A. S. No. 35 of 1921 (A. S. No. 153 of 1921 on the file of the District Court of Tanjore) preferred against the decree of the District Munsif of Negapatam in O. S. No. 587 of 1919.

M. Subbaroya Aiyar for appellant.

M. Patanjali Sastri for respondent.

The Court delivered the following

JUDGMENT :—The defendant is the appellant in this Second Appeal.

The plaintiff is the heir of the original mortgagor. The defendant is the mortgagee. The mortgage was dated 14th December, 1912, and is evidenced by Ex. I.

The first point argued for the appellant before me is that the plaintiff is not entitled to maintain the suit because she parted with the equity of redemption by the sale deed, dated 17th April, 1914, and therefore she is not entitled to redeem. He relies upon Dr. Ghose on *The Law of Mortgages in India,* page 253, where the case of *Kinnaird* v. *Trollope* (1) is referred to. The case cited has nothing to do

*S A No. 1081 of 1922. 31st October, 1924.

1. 39 Ch D 636.

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with the point now raised. On the other hand, the last sentence of Dr. Ghosh, it should be noted, says, " But this right cannot be actively asserted, and is in this respect unlike the ordinary right to redeem which is possessed by every mortgagor, " is against the appellant. It may be that a mortgagor who once parted with his right of redemption absolutely has no right to redeem in England. Mr. Subbaroya Aiyar refers to Jones on *Mortgages,* Vol. II, S. 1056. But even Jones says at the end of the paragraph, "But a mortgagor who has conveyed the land subject to the mortgage and has expressly reserved a lien for the purchase money may redeem by virtue of such interest, " citing two American cases.

In the present case part of the consideration was reserved by Ex. V and under S. 55 of the Transfer of Property Act plaintiff has a vendor's lien in respect of a reserved amount so that plaintiff's case comes within the last clause of S. 1056. In my opinion under S. 91 of the Transfer of Property Act a mortgagor is entitled to redeem. The case in *Johnes* v. *Thomas* (2) relates to a case of an assignment of interest during the pendency of a suit and in India is governed by O. 22, R. 10. That decision cannot help the plaintiff. I think the lower Courts are right in holding that the plaintiff is entitled to redeem.

The second point argued for the appellant is that he is entitled to a greater amount than what was found by the Courts below. At the end of one year from the date of the mortgage document, if there is a default of payment of both principal and interest, the mortgagee is entitled to compensation. The lower Courts allowed interest at the rate of 18 per cent per annum of the principal only. If the rate of compensation for default in payment of principal awarded was at a lower rate than 18 per cent. probably there would have been some substance in this argument. But as the mortgagee gets at the enhanced rate of 18 per cent., I think this is sufficient compensation for default in respect of both the principal and the interest. I do no think that the case calls for any modification in my hand in respect of this.

The third point argued by the appellant is that there is no misconduct on his part and that he is entitled to costs of the suit. I agree that he is entitled to costs of the suit only before the District Munsif's Court. He has never raised

2. 11 Beaven 501.

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this in the Lower Appellate Court and though I am willing to modify the decree in his favour I do not think this makes a difference in the costs of the Second Appeal. I therefore modify the decree of the District Munsif by allowing costs of the suit to the defendant but otherwise I dismiss the Second Appeal with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Narayana Reddi v. Dyvadeenachar.

Pandalapalli Narayana Reddi and others ... *Petitioners* (Accused 1 to 3 in C. C. No. 3 of 1923 on the file of the Court of the Taluq Magistrate, Tadpatri)*

v.

G. Dyvadeenachar ... *Respondent (Complainant in do.).*

Madras Estates Land Act, S. 212 (b)—Produce—Meaning—Cattle other than ploughing cattle distrained for arrears of rent—Rescue of, by defaulter—Conviction for, under S. 212 (b)—Legality—Remedy of distrainer in such case—S. 90 of the Act—Effect.

The word "produce" in S. 212 (*b*) of the Madras Estates Land Act means "produce of the land or trees in the defaulter's holding" dealt with in S. 77(*ii*) of the Act. It does not include all cattle other than ploughing cattle.

The landholder distrained two she-buffaloes and a calf belonging to the petitioners for arrears of rent due to him by them. The petitioners forcibly rescued the cattle after they had been distrained, and for this they were convicted by the Courts below under S. 212 (*b*) of the Estates Land Act.

Held, that the petitioners did not commit any offence under S. 212 (*b*) of the said Act.

Held, further that the distrainer's remedy was under S. 90 of the Act to ask the Collector to get back the distrained property or its value.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment, dated 31st December, 1923, of the Court of the Sub-divisional Magistrate, Gooty, in Cr. A. No. 64 of 1923, preferred against the judgment in C. C. No. 3 of 1923 on the file of the Court of the Taluq Magistrate of Tadpatri.

S. Ranganatha Aiyar for petitioners.

The Public Prosecutor on behalf of the Crown.

V. Ramadoss for respondent.

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*Cr R C No. 141 of 1924
(Cr R P No. 124 of 1924). 14th November, 1924.

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The Court made the following

ORDER :—This case raises a somewhat novel point under S. 212 (*b*) of the Estates Land Act. The complainant, the Shrotriemdar, distrained some cattle belonging to the petitioners before me for arrears of rent due to him. The cattle were not ploughing cattle but were two she-buffaloes and a calf. The lower Courts have found that the accused forcibly rescued the cattle after they have been distrained and have convicted them under S. 212 (*b*) and sentenced each of them to a fine of Rs. 120.

It is argued before me that S. 212 (*b*) does not deal with the rescue of cattle at all and that such rescue is not an offence under that section. S. 212 (*b*), leaving out the words inapplicable here, reads as follows :—" forcibly or clandestinely removes any produce duly distrained under this Act." The question to be decided is whether cattle can be brought under the word " produce. " I am inclined to think that it cannot. The words of S. 212 (*b*) seem to be taken from the Bengal Tenancy Act, S. 186, but in that Act the word " produce " does not appear but the word used is " property. " The fact that the word " produce " is substituted for the word " property " seems to indicate that it was done advisedly to restrict the scope of the provision. Regarding forcible or clandestine removal of things duly distrained, it seems to me that some light is thrown on this by Ss. 77 and 90 of the Estates Land Act. S.77, cl. (*ii*) states what the landholder may distrain, namely, " the moveable property of the defaulting ryot or the growing crops, or the produce of the land or trees in the defaulter's holding. " That of course includes cattle which are not ploughing cattle which are exempted by cl. (*b*) of that section. Under S. 90, cl. (*b*) if a person forcibly or clandestinely takes away moveable property once distrained, provision is made for an application by the distrainer to the Collector to pass an order directing that the property be restored or that its value be paid. Then we have got the provision under S. 212 (*b*) which talks about " produce " duly restrained under the Act being forcibly or clandestinely removed. It seems to me, reading all the sections together, that the word " produce " in S. 212 (*b*) really means " produce of the land or trees in the defaulter's holding " dealt with in S. 77 (*ii*), giving a wide meaning to the word " produce," it may probably include a flock of sheep or other cattle

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and the Public Prosecutor argues that all cattle other than ploughing cattle would come under the word "produce." I think this is putting too wide a meaning on the section. For some reason which is not apparent the Legislature has thought fit to exclude things other than produce when forcibly or clandestinely removed from the scope of S. 212 (*b*), for they could easily have used the word "property" to cover all items of property if they wished. The fact that the word "property" was replaced by the word "produce" suggests that it was intended that a restricted meaning should be given to the word "produce," and I feel therefore satisfied that we should construe the word "produce" in S. 212 (*b*) as meaning "produce of the land or trees in the defaulter's holding." In this view it must be held that the accused have committed no offence which falls under S. 212 (*b*). The distrainer's remedy seems to be under S. 90 to ask the Collector to get back the distrained property for him or its value.

The Revision Petition is therefore allowed and the conviction set aside. The fines, if paid, will be refunded.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Vangali Venkanna and others ... *Appellants** (*Defendants* 1 *to* 8)

v.

Polamarasetti Chinna Appalaswami... *Respondent* (*Plaintiff*).

Venkanna v. Chinna Appalaswami.

Service inam—Village service inam—Sale of—Not void ab initio—*Purchaser deprived of possession by successor in office—Suit by, to recover purchase-money paid by him—Limitation—Limitation Act of* 1908, *Art.* 97—*Applicability—Liability of purchaser to account for rents and profits.*

The sale of a village service inam is not void *ab initio*. It is good so long as the alienor is alive, but the vendee cannot assert a title either against the Government or against the successor in office of the alienor.

Plaintiff purchased a carpenter-blacksmith inam from defendants 1 and 2 under a sale deed, dated 26th April, 1909 and obtained actual possession of the property on the same date. Defendants 3 and 4, who were appointed to the office to which the inam appertained in the place of defendants 1 and 2, obtained a decree for possession of the property on 26th May, 1917, and obtained actual possession from the plaintiff on 7th September, 1918.

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*S A No. 1065 of 1922. 28th October, 1924.

Venkanna v. Chinna Appalaswami.

In a suit brought by the plaintiff on 10th September 1918 to recover the amount paid by him for the sale, *held*, that Art. 97 of the Limitation Act applied to the case, the starting point of limitation being the date on which he lost possession.

Held, further that the plaintiff, who was entitled to recover the amount paid by him, was not accountable for the rents and profits of the property received by him while in possession thereof.

Second Appeal against the decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. Nos. 311 and 348 of 1921 (A. S. Nos. 164 and 167 of 1920 on the file of the District Court, Vizagapatam), preferred against the decree of the Court of the District Munsif at Vizagapatam in O. S. No. 549 of 1918.

Y. Suryanarayana for appellant.

B. Satyanarayana for respondent.

The Court delivered the following

JUDGMENT :—The first point argued in this Second Appeal is that the suit is barred by limitation.

Both the Courts have held that Art. 97 of the Limitation Act applies to the case. But Mr. Satyanarayana contends that Art. 62 applies. In this case the plaintiff was actually in possession of the property on the date of the sale which was on 26th April, 1909. The property which he purchased was a carpenter-blacksmith inam. Defendants 3 and 4 were appointed as village blacksmiths and they brought a suit in the Revenue Court for possession and a decree was given on 26th May, 1917. Possession was actually given to defendants 3 and 4 on 7th September, 1918. Both the Courts have held that limitation began to run only from the date on which the plaintiff was dispossessed of the property, *i. e.*, 7th September, 1918. The suit was brought on 10th September, 1918. Now the contention of the appellant is that the sale itself was void *ab initio* and the period of limitation must be calculated from the date of the sale, *i. e.*, 26th April, 1909, and he relies upon S. 5 of Act III of 1895. Under that section a village service inam cannot be transferred either by act of parties or through Court. But it does not prevent a person who is the village office-holder from either leasing the property or transferring it for consideration during his lifetime. Under the Inam Law the Government is the owner of the property and an office-holder is entitled to the usufruct of the property during the time he holds office. The moment he resigns it

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or he is dismissed or dies his successor will be entitled to the property. So long as he holds the office he enjoys the inam and a transfer by him of the land is not absolutely void. It is good so long as he is alive but the vendee cannot assert a title either against the Government or against the successor in office of the person who transferred the property to him. That being the law, it cannot be said that a transfer like this is *ab initio* void for the simple reason that on the vendor resigning the office or on the appointment of his successor the inam land has to go to the office-holder. In this case, on the appointment of defendants 3 and 4, the right of defendants 1 and 2 to hold land ceased and the Revenue Court gave a decree in favour of defendants 3 and 4 for possession of property. That being so the question is whether Art. 97 of the Limitation Act applies. Art. 97 gives three years' time for money paid upon existing consideration which afterwards fails. Here the vendee, *i. e.,* the plaintiff was in actual possession of the property till he was evicted therefrom by a decree of the Court. The consideration having failed only on the date on which the plaintiff was dispossessed of the property, limitation began to run only from that date.

Reliance is placed by Mr. Satyanarayana upon a case in *Juscurn Boid* v. *Pirthi Chand Lal Choudhury* (1). In that case it was held that limitation period should be calculated from the day on which the suit declaring a sale invalid was brought and not from the date on which an Appellate Court confirmed the decree of the Lower Court. That case does not apply to the present case. Their Lordships observe at page 679 :—" There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run but that is not the case here. " As observed by them the loss of possession or failure to get possession may be the starting point of limitation. In this case the plaintiff did lose possession on a certain day and limitation must be calculated from that day. In this connection reference may be made to the decision of the Privy Council in *Harnath Koer* v. *Indar Bahadur Singh* (2) in answer to the argument of the appellant that if a transaction is void *ab initio* limitation ought to run from the date of the transaction. Their Lordships observe at page 75 :—" An agreement, therefore, discovered to be void

1. (1918) I L R 46 C 670 (P C).
2. (1922) 50 I A 69 : 44 M L J 489.

Venkanna v Chinna Appalaswami

is one discovered to be not enforceable by law and on the language of the section would include agreement that was void in that sense from its inception as distinct from a contract that becomes void." The decision in *Narsing Shivbakas* v. *Pachu Rambakas* (3) covers the point and it was held there that limitation began to run from the date on which the plaintiff lost possession of the property. I find this contention is not tenable and the Lower Court has rightly held that Art. 97 applies to the case.

The next contention of the appellant is that the plaintiff was in possession of the property for eight years and that he should be made to give an account of the rents and profits before he could claim the amount paid by him for the purchase of the property. The Subordinate Judge has given plaintiff 6 per cent. from the date of dispossession to the date of payment. It cannot be said that the interest on Rs. 800 which the defendant should have realised would be lower than the amount of income which the plaintiff derived from the property. Granting for argument's sake that the appellant's contention is sound it is quite clear that the income did not amount to more than what the defendants could reasonably have realised by lending the amount on interest. But it is unnecessary to consider the point as I hold that when the plaintiff who paid consideration for the sale is deprived of the property sold to him he is entitled to get back the amount paid by him. He is not in the position of a mortgagee who is accountable for rents and profits or of a trespasser who is accountable to the owner for the rents and profits he has received. Supposing he did not realise from the land during the eight years what he could have realised by investing Rs. 800 for interest, can it be said that defendants should be asked to pay the damages which the plaintiff has sustained?

The decree of the Lower Appellate Court is correct and the appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

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3. (1913) I L R 37 B 538.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

V. K. Manikka Mudaliar ... *Appellant** (*Defendant*)

v.

K. Mahammad Ziavuddin Saheb... *Respondent* (*Plaintiff*).

Manikka Mudaliar *v.* Md. Ziavuddin Saheb.

Registration Act, S. 77—Suit to obtain registration under—Maintainability—Matter referred by Sub-Registrar to Registrar under S. 34 (4) of Act—Procedure proper in case of—Registrar passing order "Registration refused"—Remedy of aggrieved party—Suit under S. 77—Appeal under S. 72—Application under S. 73—S. 76 (a)—Orders falling under.

The plaintiff presented a document executed in his favour before a Sub-Registrar for registration within four months of the date of its execution. The Sub-Registrar ordered notice to the executant who appeared beyond the four months. The Sub-Registrar referred the matter to the Registrar under S. 34(4) of the Registration Act, forwarding the document also to the Registrar. The Registrar passed an order "Registration refused" and gave reasons in which he held that the delay of the parties in appearing beyond four months did not "come under urgent necessity or unavoidable accident." The document was then returned to the Sub-Registrar, who furnished to the plaintiff a copy of the order. The Sub-Registrar did not follow up the order of the Registrar by passing an order "Registration refused."

In a suit instituted by the plaintiff to obtain registration of the document under S. 77 of the Registration Act, *held,* that the suit was maintainable and that the plaintiff's remedy was not merely to appeal against the order of the Sub-Registrar under S. 72, or to apply to the District Registrar under S. 73 of the Act.

The order passed by the Registrar fell under S. 76 (*a*) of the Act, which is wide enough to cover all orders of the Registrar refusing registration—whether such orders are passed on documents presented to him in the first instance or otherwise.

Procedure proper to be followed by the Registrar on a matter being referred to him under S. 34 (4) and proviso to S. 34 (1) of the Act.

Second Appeal against the decree of the Court of the Subordinate Judge of Vellore in Appeal No. 124 of 1922 (A. S. No. 243 of 1921 on the file of the District Court of North Arcot) preferred against the decree of the Court of the District Munsif of Vellore in O. S. No. 511 of 1920.

C. V. Ananthakrishna Aiyar for appellant.

A. Sundaram, G. Krishnaswami Aiyar and *T. Krishnaswami Aiyangar* for respondent.

The Court delivered the following

JUDGMENTS :—*Ramesam, J.* :—This Second Appeal arises out of a suit to obtain registration under S. 77 of the

Ramesam, J.

*S A No. 764 of 1923. 19th November, 1924.

Manikka Mudaliar v Md. Zia-uddin Saheb.

Ramesam, J.

Registration Act. The facts are as follows:—The suit document (Ex. A) was executed on 29th November, 1919, by defendant in favour of plaintiff. The plaintiff presented it before a Sub-Registrar for registration on 24th March, 1920, *i. e.,* within four months of the execution. The Sub-Registrar ordered notice to the executant who appeared on 19th April, 1920, *i. e.,* beyond four months. The Sub-Registrar referred the matter to the Registrar under S. 34 (4) of the Act. In so referring the matter, he seems to have forwarded the document also to the Registrar though this is not necessary under S. 34 (4), the Office of the Registrar and the Joint Sub-Registrar being situate in the same building. The Registrar passed an order on 4th May, 1920 " Registration refused " and gave reasons in which he held that the delay of the parties in appearing beyond four months does not " come under urgent necessity or unavoidable accident " (Ex. B). The document was then returned to the Sub-Registrar, who furnished to the plaintiff a copy of the order on 8th June, 1920. The present suit was filed on 14th June, 1920, the re-opening day of the District Munsif's Court of Vellore. The District Munsif dismissed the suit on the ground that the plaintiff's remedy was to have appealed against the order of the Sub-Registrar under S. 72 or made an application to the District Registrar under S. 73. On appeal the Subordinate Judge reversed the decision of the District Munsif and gave a decree. The defendant files this Second Appeal.

Where a matter is referred to the Registrar under S. 34 (4) and proviso to S. 34 (1), the Registrar may direct the registration if he is of opinion that the delay was due to " urgent necessity or unavoidable accident. " The proviso does not describe the form of the order to be passed by the Registrar if he is not so satisfied about the delay. But, it may be conceded in favour of the appellant, that the proper form of the order is to express his opinion that the delay is not due to urgent necessity or unavoidable accident. When he so expresses his opinion (such opinion being remitted to the Sub-Registrar), the Sub-Registrar ought to follow it up by endorsing on the document " Registration refused " and then the remedy of the person who seeks registration is to file an appeal under S. 72. This is the view taken by the Bombay High Court in *Fattechand Anandram* v. *Umaji* (1)

1. (1922) I L R 47 B 290.

Manikka Mudaliar v. Md. Ziavuddin Saheb.

Ramesam, J.

and by the Punjab Chief Court in *Harkishen Singh* v. *Sarmukh Singh* (2), where the exact reason for the refusal of the Sub-Registrar does not appear. A similar view is taken in the parallel section 26 in *Gangadara* v. *Sambasiva* (3). [Cf. *Gangava* v. *Sayava* (4)]. I agree with these decisions. So far the District Munsif is right. But, in the present case, the District Registrar did not pass the order which is the proper one according to the above decisions, *viz.*, an order expressing his opinion about the delay. On the other hand he passed an order on the document "Registration refused." Nor did the Sub-Registrar follow up the order of the Registrar by passing an order "Registration refused." The District Munsif is in error in paragraph 7 of his judgment where he stated, "The Sub-Registrar on receipt of the order has endorsed on the document 'registration refused' on the same date 4th May, 1920." This mistake of the District Munsif has been pointed out by the learned Subordinate Judge. The question that arises before us is—What is the effect of the irregular procedure of the Registration Officers should the party suffer for their mistakes? One way of construing the order of the Registrar is to regard him as having abridged the proper and regular procedure, *i. e.*, instead of the matter going before the Sub-Registrar for his endorsement and an appeal being filed against the order of the Sub-Registrar and the Registrar passing final orders on such appeal, he anticipated such last order in appeal and passed his final order at an earlier stage. If so, the plaintiff's suit is maintainable. But, even if this view of the Registrar's order cannot be taken, the question is, not, what is the proper order which the Registrar ought to have passed but, what is the effect of the *order he has actually* passed. The question is whether it falls under S. 76 (*a*) so as to enable the plaintiff to sue. In my opinion, the language of S. 76 (*a*) is wide enough to cover all orders of the Registrar refusing registration—whether such orders are passed on documents presented to him in the first instance or otherwise. Mr. Anantakrishna Aiyar argues that the clause is limited to the first class of cases only. If the Registrar passes orders properly it is true no other class will fall under S. 76 (*a*). But if the Registrar passes an order refusing registration by following an irregular procedure, I do not see why such an order should not fall under

2. (1917) 43 I C 294.
3. (1916) I L R 40 M 759: 33 M L J 51 (F B).
4. (1896) I L R 21 B 699.

Manikka Mudaliar v. Md. Ziavuddin Saheb.

Ramesam, J.

S. 76 (*a*). Mr. Anantakrishna Aiyar argues that the aggrieved party must first take some steps to make the Registering Officers follow the proper procedure and then come to the Civil Court at the proper stage of the proceedings as contemplated by the Act and he argues that the arm of law is strong enough to compel the Registering Officers to follow the proper procedure. It may be that the arm of law is strong enough to get the procedure rectified. Yet I do not see why the party should suffer for the Registrar's irregularity, *i. e.*, why he should take some extraordinary remedy (such as a *mandamus*) to get the Registering Officers to observe the proper procedure and why, when the language of S. 76 (*a*) is wide enough to cover the actual order passed, he should not go to the Civil Court at once.

The order of the District Registrar misled the Sub-Registrar who, seeing that his superior officer passed an order "Registration refused," thought it would be presumptuous on his part to pass the same order once again and abstained from doing so. On the actual events that happened, the view of the Subordinate Judge is right and I would dismiss the Second Appeal with costs.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—I agree.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Anappindi Somayya ... *Appellant** (*Plaintiff*)

v.

Ayyalasomayajula Venkayya and others ... *Respondents* (*Defendants* 1 *to* 5, 7 *and* 19).

Somayya v. Venkayya.

Hindu Law—Widow—Alienation by—Necessity—Proof—Onus on alienee—Recitals of necessity in deed of alienation—Weight due to—Presumption in case of ancient alienation—Evidence sufficient to prove necessity in case of such alienation.

The suit was by a reversioner to recover properties sold by the last male owner's widow in 1871, on the ground that there was no necessity justifying the alienation. The last male owner died in 1869 or 1870 ; his widow died in 1917 ; and the suit was instituted in 1918, nearly half a century after the date of the sale.

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*S. A. No. 572 of 1922. 22nd October, 1924.

Somayya *v.* Venkayya.

The vendor and the vendee were dead at the date of suit ; and there was no direct evidence as regards the existence of the necessity for the alienation. But the deed of sale contained a recital that the purchase-money was required for the purpose of discharging the debts of the last male owner. The Lower Appellate Court found that the circumstances of the case were such as to justify a reasonable belief that if an enquiry had been made by the purchaser it would have confirmed the truth of the representation contained in the recital, the circumstances being, *inter alia* (1) that the portion of the property sold was small ; (2) that the consideration was inconsiderable ; (3) that the lands sold were dry lands which yielded very little income ; (4) that the last male owner died indebted ; and (5) that the plaintiff's father acquiesced in the alienation and did not seek to set it aside.

Held, that on the above facts the Courts below were justified in holding that the alienee had discharged the onus of proving that the sale was for necessity.

Scope of the presumption in respect of ancient alienations laid down in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri*, I L R 44 C 186 and *Venkata Reddi* v. *Rani Saheba of Wadhwan*, I L R 43 M 541 explained.

Second Appeal against the decree of the District Court of Godavari at Rajahmundry in A. S. No. 343 of 1920, preferred against the decree of the Court of the Subordinate Judge of Rajahmundry in O. S. No. 60 of 1918.

G. Lakshmanna and *A. Satyanarayana* for appellant.

K. Ramamurthi for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff instituted the suit as the reversioner to the estate of one Eswarappa who died in the year 1869 or 1870. After his death, his property was taken possession of by his widow Rajamma, and she died in the year 1917. In 1871 she sold some items of property in favour of the first defendant's father for Rs. 250. The sale is now questioned by the plaintiff on the ground that there was no necessity justifying the alienation. The vendor as well as the vendee have died and the question had to be tried after the lapse of about half a century from the date of the sale. As might be expected, there is no direct evidence as regards the existence of the necessity for the alienation. The deed of sale contains a recital that the sum of Rs. 250 was required for the purpose of discharging the debts incurred by the deceased husband of Rajamma. The burden was upon the alienee to show that the sale was made for a necessary purpose and the District Judge agreeing with the Subordinate Judge held that in the circumstances of the case the onus was discharged.

Somayya *v.* Venkayya.

The Judicial Committee have clearly laid down in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1) and in *Venkata Reddi* v. *Rani Saheba of Wadhwan* (2) that in respect of ancient alienations the amount of evidence that should reasonably be demanded is not the same as in the case of recent transactions. Full and detailed evidence which may otherwise be forthcoming will not, owing to the lapse of time, be available and, in such circumstances, presumptions are permissible to fill in the details which have become obliterated by time.

For the transaction to be upheld the alienee may establish that the alienation was made in circumstances of necessity. But he is not required to go so far. It is sufficient for him to prove that a representation was made that such necessity existed and that he acted honestly and made proper enquiry to satisfy himself of its truth. I shall deal first with the case where he seeks to make out that necessity actually existed. In respect of ancient transactions, what is the kind of proof that is required ? Ordinarily, recitals in deeds are evidence only as between the parties to the conveyance. But their Lordships point out that in case of transactions evidenced by ancient deeds, the recitals cannot be disregarded although no inflexible rule can be laid down as to the weight they are entitled to receive. But recitals consistent with the probability and circumstances of the case assume importance and may be acted on. In other words, ordinarily the recital regarding necessity in a document is not direct evidence of the existence of the necessity. If hearsay evidence or second-hand proof is altogether rejected the recital cannot be relied on at all. Hearsay is excluded because it is not given on oath or cannot be tested by cross-examination and also for the reason that every witness must give his testimony under such circumstances as would subject him to the penalties of falsehood. Although a recital in a deed is not direct but only second-hand evidence, still their Lordships of the Judicial Committee say that it should not be disregarded. This is an exception to the general rule that direct evidence must be given of a fact. Recital in a document, not of a recent date, regarding the existence of necessity is some evidence of its existence and if the recital is consistent with the probability and circumstances of

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1. (1916) I L R 44 C 186 : 31 M L J 563 (P. C.).
2. (1919) I L R 43 M 541 : 38 M L J 393 (P C).

Somayya v Venkayya.

the case the Courts will generally act upon it. That is to say, full and detailed evidence which is ordinarily required is in such cases dispensed with and presumptions are made to fill in gaps.

Let me secondly take the case where the alienee seeks to prove that a representation was made to him, that he made proper enquiry, that he became satisfied of its truth and acted upon it. The recital in the deed is evidence of the fact that a representation was made to him. He acted upon that representation. This admits of no doubt. Then, regarding the enquiry, can full and detailed evidence be expected ? In this respect again, Courts do not insist upon strict proof and if the circumstances are such as to justify an inference that an enquiry was made, the Courts will hold without rigid proof that an enquiry was actually made.

This is the general rule and the omission of full details may be made good by presumptions at whatever point the proof is wanting. It is difficult to lay down any hard and fast rule. A sound exercise of judicial discretion is the only safe guide.

Their Lordships of the Judicial Committee, having special regard to the facts with which they were dealing, illustrated the application of the rule regarding relaxation of proof in respect of ancient alienations in the following passage which occurs in their judgment in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1) :— " The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then, when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. " These observations were made only by way of illustration. I make this remark because I have found a tendency to unduly restrict the application of the beneficent rule laid down in the judgment of the Judicial Committee. It is forgotten that these observations, very useful as they are, were made with reference to the facts of the particular case then under consideration and that there are other observations in the judgment which are at least equally important. I have been tempted to dwell on this matter at some length on account of the long argument, which

1. (1916) I L R 44 C 186 . 31 M L J 563 (P C).

Somayya v. Venkayya.

Mr. Lakshmanna, the learned vakil for the appellant, addressed to me on the subject. It is, however, sufficient to say that judged even by the test which is laid down in the passage extracted above, the alienee in the present case is fully protected and it has been established that the sale is valid.

The learned District Judge has, in a very full and exhaustive judgment, found that the circumstances of the case are such as to justify a reasonable belief that if an enquiry had been made it would have confirmed the truth of the representation contained in the recital. To mention only a few facts, the portion of the property sold was very small. The consideration was inconsiderable being only Rs. 250. The lands were dry lands and yielded very little income, if they yielded any at all. The properties that fell at the partition to the plaintiff's branch of the family were sold away at some time, presumably to pay off the family debts. If the plaintiff wanted to make out that those properties were sold at a different time or for a different purpose, these being matters exclusively within his knowledge, he should have given direct proof. In the absence of it, the inference must be against him. There then is the further fact that the plaintiff's father acquiesced in the alienation and did not seek to set it aside. The learned Judge's inference from these and other facts is, in my opinion, perfectly correct and the Second Appeal fails and is dismissed with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

V. A. V. S. Firm ... *Appellants** (*Petitioners*)

v.

P. S. N. Muruganathan Chetti ...*Respondent* (*Respondent*).

V. A. V. S. Firm v. Murugana-than Chetti.

Insolvency—Firm—Partner of—Insolvency petition by or against, pending in High Court—Insolvency petition by or against another partner filed subsequently in District Court—Transfer of, to High Court—Discretion to refuse—Presidency Towns Insolvency Act, S. 97—Effect—Order of High Court Judge sitting in insolvency refusing to transfer—Appeal from—Presidency Towns Insolvency Act, S. 8, cl. 2 (b).

In the firm to which the respondent belonged there were three partners, and insolvency proceedings were pending before the Official Assignee, Madras,

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*O S Appeal No. 60 of 1924. 7th November, 1924.

against the two partners of the respondent. An application made to the Judge sitting in the Insolvency Court, Madras, for the transfer of an insolvency petition presented by or against the respondent to the District Judge of Coimbatore to the file of the High Court was rejected by the learned Judge.

On appeal from his order, *Held,* (1) that under S. 8, cl. 2 (*b*) of the Presidency Towns Insolvency Act, an appeal lay from the said order, and (2) that the learned Judge had no discretion to refuse to transfer the petition presented to the District Court of Coimbatore.

S. 97 of the Presidency Towns Insolvency Act provides that where insolvency proceedings are pending against one partner in a firm any other insolvency petition shall be presented in or transferred to the Court in which the first-mentioned petition is in course of prosecution ; and the section is sufficiently wide to cover insolvency petitions presented under the Provincial Insolvency Act to a Court which is subject to the superintendence of the High Court.

On Appeal from the judgment of the Hon'ble Mr. Justice Waller, dated 28th August, 1924, and passed in the exercise of the Original Insolvency Jurisdiction of the High Court, refusing to transfer I. P. No. 105 of 1924 from the file of the District Court, Coimbatore, to that of the High Court and to consolidate the same with I. P. Nos. 33 and 68 of 1921 on the file of the High Court.

In the matter of P. S. N. Muruganathan Chetti of P. S. N. Muruganathan Chetti & Sons, debtors in I. P. No. 105 of 1921 on the file of the District Court of Coimbatore.

V. Varadaraja Mudaliar for appellants.

Messrs. Grant and *Greatorex* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal against an order of Waller, J., sitting in the Insolvency Court in which he refused to transfer an insolvency petition presented to the District Judge of Coimbatore to the file of his Court.

There is a preliminary objection that no appeal lies on the ground that the Judge's order is not a judgment. But this can easily be disposed of by reference to S. 8, cl. 2 (*b*) of the Presidency Towns Insolvency Act, which provides for an appeal lying to this Court against any order made by a Judge in the exercise of jurisdiction conferred on him by this Act.

The question we have to decide turns upon the interpretation of S. 97 of the Presidency Towns Insolvency Act. This section runs thus :—

"Where an order of adjudication has been made on an insolvency petition against or by one partner in a firm, any other insolvency petition

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against or by a partner in the same firm shall be presented in or transferred to the Court in which the first-mentioned petition is in course of prosecution; and such Court may give such directions for consolidating the proceedings under the petitions as it thinks just."

Waller, J. declined to pass any orders on the application for transfer on the ground that it was ambiguous whether the Court to which the insolvency petition was presented or the Court in which the earlier proceedings against a partner in the same firm was pending should take action. In the firm to which the respondent belongs there are three partners and insolvency proceedings are still pending before the Official Assignee against Ambalavana Chetti and Narayanaswami Aiyar who are the other two partners of the firm. Waller, J. was impressed by the decision of Justice Cave in *In re, Nicholson* (1). That learned Judge refused to make an order for transfer of bankruptcy proceedings pending before a County Court Judge on the ground that he thought that the application should be made to the County Court Judge. At the date when that case was decided the Bankruptcy Act of 1883 was the Act in force in England and was equally applicable to bankrupts in the County Court and in the High Court, and no rules had been framed providing for making transfers under S. 112 which corresponds to S. 97 of our Presidency Towns Insolvency Act. After rules had been framed no difficulty was found in another case *In re, Williams* (2) in making an order under this section.

S. 97 of the Presidency Towns Insolvency Act is plain in its terms and imperative. It provides that where insolvency proceedings are pending against one partner in a firm any other insolvency petition shall be presented in or transferred to the Court in which the first-mentioned petition is in course of prosecution. There is no limitation of the words "any other insolvency petition" to insolvency petitions presented under the Presidency Towns Insolvency Act. It would therefore appear to be sufficiently wide to cover insolvency petitions presented under the Provincial Insolvency Act to a Court which is subject to the superintendence of this Court. There is no reason why the legislature should have made a provision of this kind in order to provide for transfers of insolvency proceedings only from one High Court to another, if the policy underlying the section is of general application. The section does not declare by whom the order of

1. 3 Morrel 48. 2. 5 Morrel 103.

transfer should be made, but there can be no ambiguity in India because the only Court exercising jurisdiction in insolvency under the Presidency Towns Insolvency Act for the Presidency of Madras is the High Court of Madras. This is declared by S. 3 of the Act, and under S. 6, the Judge who is deputed to sit in the Court of Insolvency exercises all the powers conferred on the High Court under the section. Our attention has been called to the decision in *Srinivasa Aiyangar* v. *The Official Assignee of Madras* (3) in which it was held by a Bench of this Court that the Judge exercising insolvency jurisdiction in the High Court had no power to transfer a case pending before him under the Presidency Towns Insolvency Act to the District Court of Tanjore. The *ratio decidendi* of that case appears to be that the Court to which the insolvency petition was transferred was not competent to hear and dispose of the same, because the jurisdictions under the Presidency Towns Insolvency Act and the Provincial Insolvency Act were distinct, and therefore the District Judge of Tanjore would have no jurisdiction to proceed under the Presidency Towns Insolvency Act in the insolvency of a debtor who had presented a petition before the High Court of Madras. The decision was one given with special reference to S. 24 of the Code of Civil Procedure which is made applicable by S. 90, cl. 1 of Act III of 1909 to insolvency proceedings. No such difficulties confront us in the present case because the words of S. 97 confer power on the Court to which the case is to be transferred to deal with the insolvency petition made against or by the same partner in the same firm and permit the Court to consolidate the proceedings. We have also been referred to a decision of Marten, J. in *In re, Maneckchand* (4) in which he held that the Commissioner in Insolvency had no power to stay insolvency proceedings in a District Court under S. 18 of this Act, the grounds of his decision being that the District Court in its insolvency jurisdiction was subject to the superintendence of the High Court on its Appellate Side and not to the Commissioner in Insolvency, by which term he designated the Judge sitting in the Insolvency Court. It is unnecessary to canvass the correctness of that decision, as the terms of S. 97 of the Act are quite independent of the provisions of S. 18 and do not contain any reference to the powers of the High Court of superintendence over

3. (1913) I L R 38 M 472 ·25 M L J 299.
4. (1922) I L R 47 B 275.

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other Courts subject to its Appellate Jurisdiction, which it has under S. 107 of the Government of India Act. For the purposes of the present case it is unnecessary to invoke the powers conferred on Courts of Insolvency in the Presidency Town and outside. S. 126 of the Presidency Towns Insolvency Act and S. 77 of the Provincial Insolvency Act (V of 1920) aid each other. As the terms of S. 97 make it obligatory on the Court exercising insolvency powers to transfer any insolvency petition in circumstances existing in this case, we are of opinion that Waller, J. had no discretion to refuse to transfer the petition presented to the District Court of Coimbatore, and that as he declined to make that order, we must allow the appeal and make the order ourselves, giving the appellant costs of this appeal payable out of the estate of the insolvent by the Official Assignee. The Court which deals with the petition may give such directions for consolidating the proceedings with the other pending insolvency proceedings as it thinks fit. Taxed costs on the Original Side scale here and before Waller, J. to be paid out of the insolvent's estate. The memorandum of cross-objections is dismissed.

A. S. V. *Appeal allowed : Memo. of cross-objections dismissed.*

[APPELLATE JURISDICTION.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

V. Gopal Chetti and others ... *Appellants** (*Petitioners*)

v.

The Ripon Press and Sugar Mill Co., Ltd., Bellary, represented by K. Venkata Rao ... *Respondent* (*Respondent*).

Gopal Chetti v. The Ripon Press and Sugar Mill Co., Ltd., Bellary.

Company—Winding up—Grounds—Justifiable lack of confidence in conduct and management of Company's affairs if and when a ground.

On an application for the winding up of a Company it was not suggested that the Company was insolvent, but it appeared that its affairs were carried on in such a way that the members of one family were able to exercise a predominating influence over the management of the Company and to secure certain benefits for themselves, that the minority were unable to protest effectually against the actions of the directors because the majority of the shares were in the hands of one family and the directors themselves were able to hold

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*O S Appeal No. 100 of 1922. 13th November, 1924.

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over the shareholders the fear of having to pay the unpaid portion of their shares, and that that caused a lack of confidence in the management of the directors which there was no hope of improving so long as the then directorate continued and the funds were in the hands of the then treasurers.

Held, that under the circumstances the only course to be taken for securing the just rights of the shareholders was to direct the winding up of the Company. (1924) A C (H L) 738. followed.

On Appeal from the order of the Hon'ble Mr. Justice Kumaraswami Sastri, dated 3rd November, 1922, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 93 of 1922 in the matter of the Indian Companies Act (VII of 1913) and in the matter of the Ripon Press and Sugar Mill Co., Ltd., Bellary.

B. Somayya and *T. R. Arunachalla Aiyar* for appellants.

S. S. Vijayaraghavachariar for respondent.

The Court delivered the following

JUDGMENT :—This is an application for the winding up of the Ripon Cotton Press Company which has its place of business at Bellary and its factory at Raichur in the Nizam's Dominions. It is not suggested that the Company is insolvent and in fact we have a statement in which dividends are shown to have been declared from 1909 till 1922. It is, however, urged that it is just and equitable that the Company should be wound up within the meaning of S. 162 (6) of the Indian Companies Act, because the Company is not being worked for the benefit of the shareholders in general but mainly for the benefit of the family of Mr. Venkata Rao who is one of the Directors of the Company and Chairman of the Board of Directors.

In *Loch* v. *John Blackwook* (1) it was held to be a good reason for making a winding up order that there was a justifiable lack of confidence in the conduct and management of the Company's affairs owing to the management being held in one family which was in a position to dominate the other shareholders and monopolise the Company's affairs for its own individual benefit. The learned Judge in the trial Court was of opinion that sufficient facts had not been proved to justify a winding up order. The case just quoted by me was not then brought to his notice as it was decided subsequent to his order of 3rd November 1922. The principal grievance of the petitioning shareholders is that very large balances, instead of being kept in a Bank where they might earn interest, are kept in the hands of the treasurers who are K. V. S. Ramachander

1. (1924) A C (H L) 738.

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& Co. represented by Mr. K. Ramachander, who is Mr. Venkata Rao's son, and that while these balances have been accumulating the amount of dividend per share has been diminishing. An enormous advantage was secured by Mr. Venkata Rao's family by a special resolution of an Extraordinary General Meeting of 26th March 1910 when it was resolved that the firm of Ramachander & Co. should be appointed the treasurers of the Company on condition of their retaining the Company's moneys without interest and also of lending moneys to the Company without interest whenever required. Simultaneously the Office of Secretary was abolished with effect from 1st April 1910. This was resolved at the meeting of 26th March 1910 and confirmed at a subsequent meeting on the 9th April. As a result of this resolution Mr. Venkata Rao's family were able to have the control of a large amount of capital for which no security was given and no interest had to be paid. It is not on record that they ever had to lend any money to the Company without interest. It was thus made advantageous to the directorate to accumulate as large balances as possible in the hands of the treasurers and to pay as small amounts as possible in the way of dividends. When I say "directorate" I mean Mr. Venkata Rao and those who had the same interest. The capital of the Company consists of 250 shares of Rs. 500 each, of which only 200 shares have been issued and Rs. 250 paid up on each share. It is alleged in the petition that Mr. Venkata Rao has control over 75 shares which are directly in the name of himself and his family. But in his evidence Mr. VenkataRao admitted that he had interest in 142 or 146 shares out of the total of 200 shares and thus in all voting he is able to command a preponderating influence. It is also alleged that if the other shareholders do not show compliance with his wishes he coerces them by threatening to call up the unpaid portions of their shares. At one time when there was a question of abandoning the Hospet Sugar Mill, which was one of the objects of the Company, P. W. 1 states that Mr. Venkata Rao threatened to call up the unpaid share capital and put the shareholders to inconvenience and trouble if they did not agree to his proposal. As the Sugar Mill is one of the objects of the Company declared in the Memorandum of Association, a special resolution of the shareholders and the orders of the Court were required by S. 12 of the Indian Companies Act for altering the Memorandum. As in 1920 to

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1922 there were five directors, of whom Mr. Venkata Rao was one and his son K. Ramachandran was another, two of his nephews and a brother-in-law were also Directors, there was every chance of the Directors being able to effect their own purpose and put pressure on the shareholders by using their power under Arts. 24 to 26 of the Articles of Association in Table A of the Act to make the shareholders pay up the calls and to forfeit the shares of those members who did not comply with their demands. Since the appointment of K. Ramachander & Co. as treasurers in 1910 the dividends per share have shown a steady decrease until in 1921 and 1922 only Rs. 15 per share were declared, this being equal to a dividend of about 6 per cent. One explanation for keeping such large sums in the hands of the treasurer is that money comes in at the end of the year and expenses have to be incurred during the working season for which a large amount of working capital is necessary ; but the balance sheets in past years do not show that more than Rs. 10,000 has ever been necessary for the working expenses of the Company, whereas the balances that have been kept have in one year been as much as Rs. 54,000. In addition to this, there have been several irregularities in the working of the Company. Dividends have not been regularly paid. Some shares were pledged in favour of a mortgagee whose transferee brought a suit and although the transfer had been recognised, the Company contested the suit O. S. No. 12 of 1917 and had to pay costs amounting to Rs. 587 and Rs. 1,176 for interest. The officers of the Company evidently did not act in a *bona fide* manner in defending the suit against the plaintiff's demand after the shares had been registered in the name of the transferee. In Small Cause Suit No. 71 of 1917 a decree was obtained for Rs. 125 on account of dividend which was being withheld without any justification. The balance sheet for 1923 is not yet available in spite of the requirements of S. 131 of the Act, although we are now nearly at the end of 1924. Although the accounts appear to have been audited every year by an auditor named G. Venkatachellam Chetti, it does not appear that the accounts at Raichur were looked into and compared with the accounts kept at the Head Office in Bellary. On 27th August, 1921, a resolution was passed by a majority of votes of the shareholders for the voluntary winding up of the Company. But this was not given effect to as the resolution was not passed at an extraordinary meeting

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called for that purpose and it did not comply with the conditions of S. 81 of the Indian Companies Act as to a three-fourths majority of shareholders. It is evident that the affairs of this Company are carried on in such a way that the members of one family are able to exercise a predominating influence over the management of the Company and to secure certain benefits for themselves. The minority are unable to protest effectually against the actions of the Directors because the majority of the shares are in the hands of one family and the Directors themselves are able to hold over teh shareholders the fear of having to pay up the unpaid portion of their shares. This causes a lack of confidence in the management of the Directors which there is no hope of improving so long as the present directorate continues and the funds are in the hands of the present treasurers. Under these circumstances, we think that the only course we can take to secure the just rights of the shareholders is to direct the winding up of the Company, and the appeal will therefore be allowed with costs here and in the lower Court and the case will be remanded to the Trial Court for the appointment of an Official Liquidator and for making such other directions as may be necessary under the provisions of Part V of the Indian Companies Act.

A. S. V. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Allahabad)

PRESENT :—LORD ATKINSON, LORD SUMNER AND SIR JOHN EDGE.

Lala Jai Narain and others ... *Appellants**

v.

Lala Ujagar Lal and others ... *Respondents.*

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Civil Procedure Code, S. 92—Trust for charitable or religious objects—Public or private—Dharmasala—Bisrant Ghaut—*Food and cloths to poor and* sadhus—*Medicines for the sick—Alleged vagueness and uncertainty of objects—Joint Hindu family—Mitakshara Law—Separation between brothers—Joint family business carried on by one of the brothers with his sons—No presumption that the brother separated from his sons—Trust moneys deposited with joint family firm—Liability for misappropriation thereof.*

P, who was a member of a joint Hindu family, governed by the Mitakshara Law, separated from his brothers and from his sons, and by his will directed

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*P C Appeals Nos. 77 and 78 of 1922. 30th October, 1924.

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that his entire separate property should be devoted, *inter alia*, to (1) the construction of a *dharmasala* and two temples and a *bisrant ghaut*, and (2) the distribution of cloths and food to the poor and *sadhus*, and of medicine gratis to the sick. The will specifically provided that no one at any time and under any circumstances should have any claim to the properties. The will named a committee of trustees to administer the trust property and execute the trusts, such committee consisting mainly of the testator's sons and grandsons. The testator's eldest son (who had separated from his brothers) carried on a joint family business with his own sons and this joint family firm held on behalf of the trustees the moneys of the *waqf* fund. The managing member of the joint family having misappropriated some of such trust moneys, in a suit under S. 92, Civil Procedure Code, *held*, that the joint family and the individual members thereof were liable for the sums misappropriated, and must repay them to the new committee appointed. When a Hindu governed by the Law of the Mitakshara, who has sons living separates from his brothers, there is no presumption of law that he has separated from his sons also. *Balabux* v. *Rukhmabai*, L R 30 I A 120 and *Hari Bakhsh* v. *Babu Lal*, L R 51 I A 163 referred to.

Held also (affirming the judgment of the High Court), that the will created a trust for public (and not private) purposes of a charitable or religious nature, and there was no vagueness or uncertainty in its objects to make it void.

Consolidated Appeals from a decree of the High Court of Judicature at Allahabad (3rd April, 1919), which modified a decree of the District Judge of Mainpuri (2nd May, 1916) decreeing the plaintiffs' claim.

The material facts appear from the judgment of their Lordships.

J. M. Parikh for appellant Jai Narain.

A. H. Clauson, K. C. and *Dube* for appellants Prag Narain and Brahma Narain.

L. de Gruyther, K. C. and *W. Wallach* for plaintiffs-respondents.

30th October, 1924. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—The suit in which these two consolidated appeals from a decree of the High Court at Allahabad have arisen was brought in the Court of the District Judge of Mainpuri in the United Provinces on the 20th May, 1915. The reliefs claimed in the suit were the removal of the then trustees of an endowment for religious and charitable purposes on account of alleged misappropriation of the endowed property, and the appointment of new trustees to whom the possession of the entire endowed property should be given; that accounts should be furnished of the property of the endowment and the misappropriations should be made good; that

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a scheme for the management of the endowment should be settled ; that any other beneficial relief should be granted ; and that costs should be decreed against any of the defendants who might be found liable. The suit was brought under S. 92 of the Code of Civil Procedure, 1908. The plaintiffs had obtained the consent in writing of the Legal Remembrancer of the United Provinces to the institution by them of the suit, such Legal Remembrancer having been the officer appointed under S. 93 of the Act to exercise in those Provinces the powers in that respect which are conferred on the Advocate-General by S. 92.

The parties to the suit are residents of Etawah in the United Provinces, and are Hindus of the Agarwal caste. The caste name is also written Aggarwall. The plaintiffs are through a common ancestor related, more or less distantly, to the defendants, and are persons who were interested in the proper management of the trust properties of the endowment. The defendants are descendants of one Sital Prasad who founded the endowment by his will of the 24th February, 1904.

The Agarwal is a well-known caste and has caste subdivisions. The members of the caste in the United Provinces and the Punjab are mainly Zamindars, or agriculturists, or are engaged in other forms of trade. The Agarwals of the United Provinces and of the Punjab carry on their business, whatever it may be, either separately or as joint families. When the business is carried on as the business of a joint family it is as a rule carried on in the name of the managing member of the joint family or in a firm name.

The first of these appeals is by Lala Jai Narain, who was defendant 1. The other of these appeals is by Lala Prag Narain and Lala Brahma Narain, who were respectively defendants 2 and 3.

As there are nine defendants in the suit against all of whom a common liability is not alleged it is advisable to state at once who the different defendants are. Sital Prasad, who founded the endowment in question, and his elder brother, Kunj Behari Lal with their father Lala Gopi Nath, constituted a joint Hindu family, which was governed by the law of the Mitakshara. After the death of Lala Gopi Nath, the brothers Kunj Behari Lal and Sital Prasad separated in 1900, and subsequently Kunj Behari Lal died childless. Before the

endowment in question was founded Kunj Behari Lal had by his will left all his property to his eldest nephew, Banke Behari Lal. Sital Prasad had married and had sons, Banke Behari Lal, above mentioned, Girwardhari Lal, Banarsi Das and Sheo Narain, defendant 8. Banke Behari Lal married and had sons Lala Jai Narain, eldest son, defendant 1, Rup Narain, who died before suit leaving a son, Shyam Behari Lal, defendant 4, Lala Prag Narain, defendant 2 and Lala Brahma Narain, defendant 3. Girwardhari Lal, second son of Sital Prasad, married and had sons Lala Gur Narain, defendant 9, and Lachmi Narain. Banarsi Das, third son of Sital Prasad, married and had sons Lala Suraj Narain, defendant 5, Brij Narain, defendant 6, and Keshab Narain, defendant 7.

Sital Prasad separated from his sons in or before 1903 and made his will of the 24th February, 1904 and died on the 5th March, 1904. There is evidence on which their Lordships find that Banke Behari Lal separated from his brothers. Banke Behari Lal and his sons constituted a joint Hindu family. Banke Behari Lal and his sons carried on business under a firm name of "Banke Behari Lal Jai Narain." It is not proved, nor, indeed, had it been even alleged, that Banke Behari Lal and his sons had ever separated, and as such a separation has not been proved the presumption in law is that they continued joint. It has not been proved that the sons of Banke Behari Lal after he died, on the 5th March, 1907, separated. Consequently it is to be assumed, unless the contrary has been proved and it has not been proved, that the business which was carried on under the firm name of "Banke Behari Lal Jai Narain" has continued to be the business of a joint family. At all material times Lala Jai Narain, defendant 1, was a member of that joint family, and appears to have acted as the managing member of the joint family, and he was also a member of a committee of trustees which was appointed by the will of Sital Prasad to manage the property of the endowment created by that will. When Shyam Behari Lal, defendant 4, was born has not been proved, but it is stated in the plaint of the 20th May, 1915, that he was then about 8 years of age ; it is thus uncertain whether he became a member of the joint family before or after the death of his grandfather Banke Behari Lal, but the question is not material as it appears to their Lordships.

Owing to a misconception of the effect of a judgment of the Board which was delivered by Lord Davey in *Balabux*

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Ladhuram v. *Rukhmabai* (1), it was generally, but erroneously, assumed that the Board had decided that when a Hindu governed by the law of the Mitakshara, who had sons living, separated from his brothers it was a presumption of law that he had separated from his sons and that he and his descendants ceased to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family. It was pointed out, however, by the Board in a judgment which was delivered on the 22nd January, 1924, in *Hari Baksh* v. *Babu Lal and another* (2) that that was an erroneous conception of the effect of what Lord Davey had said, and that no authority had been brought to the attention of their Lordships for introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara. In the case of *Hari Baksh* v. *Babu Lal and another* (2) the parties were Hindus of the Bakkal Aggarwall caste of the Punjab. In the present case the learned Judges of the High Court in appeal decided that Shyam Behari Lal, defendant 4, was not liable in respect of the *waqf* trust fund, which was deposited by Banke Behari Lal with " Banke Behari Lal Jai Narain." Possibly, the explanation of that decision is that the learned Judges had, as others had done, misconceived the effect of the judgment which had been delivered by Lord Davey.

In their plaint the plaintiffs alleged that Sital Prasad, who died on the 5th March, 1904, had by his will, dated the 24th February, 1904, made a *waqf* of his property for religious and charitable purposes; had appointed a committee of trustees, of which his eldest son Banke Behari Lal should be president ; that after the death of Sital Prasad the whole of the *waqf* property was taken possession of by Banke Behari Lal ; that the defendants 1, 2, 3 and Shyam Behari Lal, defendant 4, were at the date of the suit in possession of the *waqf* property.

The defendants 1, 2, 3 and 4 jointly filed a written statement in which they did not deny or admit the statement in the plaint that the defendants 1 to 4 were, when the suit was brought, in possession of the *waqf* property, consequently it must be taken that that statement was not traversed and was not in issue. They alleged that the will of Sital Prasad created a private endowment and that S. 92 of the Code of

1. L R 30 I A 130. 2. (1924) L R 51 I A 163 : 47 M L J 938.

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Civil Procedure, 1908, did not apply. The meaning of that allegation is that Sital Prasad's will did not create any trust for public purposes of a charitable or religious nature. They also alleged that they had been satisfactorily carrying on the management of the *waqf*, and they denied that there had been any misappropriation of the *waqf* fund and that there was any liability on them. It is not necessary to refer to the written statement of any other defendant.

Sital Prasad, who was by occupation a moneylender and zamindar, made his will on the 24th February, 1904. As translated it was so far as is material as follows :—

"I, Sital Prasad, son of Lala Gopi Nath, deceased, caste Agarwal Sahu, resident of the city of Etawah, do declare as follows :—

Let it be known that under the decree of the Civil Court, dated the 16th April, 1903, passed by the Subordinate Judge of the District of Mainpuri on the basis of the arbitration award, dated the 31st March, 1903, the whole of my property is partitioned as against my sons and grandsons. I enjoy full proprietary rights of every sort in respect of the said property and have no co-sharer or co-parcener therein. I, therefore, give it in writing as regards the said property that I shall remain in proprietary possession of the property during my lifetime, that as regards the moveable and immoveable properties that might remain in my possession at the time of my death, I make a will as follows :—A committee should be formed to carry out the directions given below. The committee would have all sorts of powers regarding the management of the said properties. My eldest son, Banke Behari Lal, should be appointed as the president (of the committee), Banarsi Das, my third son, should be the secretary and Sheo Narayan, my fourth son, Jai Narayan, son of Banke Behari Lal aforesaid, Gur Narayan, son of Girdhari Lal and Gauri Shankar, son of Raghubar Dayal, should be appointed as the members of the said committee. The president's vote should be treated as three votes, the secretary's vote as two, and each member's vote as one. The resolutions should be always passed with reference to the majority of votes and the resolution passed should be considered to be the orders of the committee and all proceedings of every sort should invariably be taken in accordance therewith. The power to remove or re-appoint the president, secretary and the members shall remain in the hands of the committee, but let it be known that any one who shall be admitted into the committee as directed above shall be from amongst my sons, grandsons and their descendants. No stranger can be admitted into the committee, nor can he, under any circumstances, make any sort of interference.

1. I consider it admissible to give some of the directions below :—The committee, so far as possible, shall be bound to comply with them.

(*a*) *Bisrant* (*ghat*) of Sri Jamunaji should be built in Etawah at a cost of about Rs. 2,500.

(*b*) A *dharmasala* containing two temples, one of Sri Mahadeoji Maharaj and the other of Sri Thakurji Maharaj should be built in Etawah, at a cost of about Rs 5,000.

(*c*) In the said *dharmasala* each of the four sons of mine should cause four small rooms to be built at his own cost under the management of the

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committee, with reference to the plan of the *dharmasala*. The amount that might be given in charity on the occasions of the marriages of my sons, grandsons or their male children, should be given in this *waqf* fund to the extent of one-fourth. Should any one fail to do so, he and his sons should be debarred from holding any of the aforesaid offices so long as they do not comply with the above directions.

(*d*) The principal amount of cash or the property should not be utilised in defraying any expenses other than those enumerated above. So far as possible about three-fourths of the income yielded thereby, *i. e.,* interest or profit should be spent on the following objects according to the discretion of the committee or on any other act of charity :—

(*i*) Such quantity of unparched grain, flour or parched barley should be given for eating to *sadhus, bairagis* (mendicants) and pilgrims as might be considered proper or in the winter season some clothes, etc., or medicine might be distributed to the sick.

(*ii*) Expenses in connection with the staff, pay of employees, repairs of the *dharmasala,* temple and *bisrant,* etc. (should be defrayed out of the said fund).

(*iii*) Should any of my sons or their descendants lead a retired life and sit in contemplation and wish to be supplied with clothes and food, then the said person should get such assistance so long as he lives in the *dharmasala.*

2. The president and the secretary shall have power to realise every sort of money, grant receipts, acknowledge full payment, affix signature, purchase and sell property, verify at the time of registration, advance money on interest, carry on every sort of trade, take all sorts of Court proceedings either themselves or through their general attorney, in short they shall have power to take all the proceedings of every sort, but all the said proceedings relating to the *waqf* shall be taken in the name of me, Lala Sital Prasad. The president and the secretary shall be competent to institute every sort of suit, set up defence and take Court procedings in their own names. There shall be no necessity to include the names of other members.

3. In addition to the cash, etc., due to or by me under my account-books and *hundis,* a 5 *biswa* zamindari share in mauza Kutubpur, pargana Bhartna, district Etawah, which forms the subject-matter of a former gift and in respect of which my name is entered in the public papers, *i. e., the khewat,* is also included in the subject-matter of this will. As regards the said property it is also directed that it may be sold if it can be sold with profit at a low rate of interest.

4. No one at any time under any circumstances shall have any sort of claim in respect of the aforesaid property. The income and expenditure, etc., of every sort shall be daily entered in the account-book.

5. The president and the secretary should, according to the arbitration award, dated 31st March, 1903, take all proceedings in the cases relating to the shops at Cawnpore, the full particulars whereof are given in the said arbitration award and get their names entered in the Court (papers) in place of my name. They should incur expenses out of the amount standing to my credit in the papers. Moreover, the president and the secretary should cause mutation proceedings to be taken in respect of such property or land as might belong to any party under the said arbitration award but which might be

entered in my name and in respect of which mutation proceedings, etc., might not be completed in my lifetime.

I have, therefore, executed this will so that it may serve as evidence."

It is obvious to their Lordships that Sital Prasad by his will disposed of all his property.

When Sital Prasad died his property was represented by Rs. 48,000 in cash or securities, two houses at Etawah valued at Rs. 2,000, and zamindari property valued at Rs. 2,000. The committee took over the houses and the zamindari property. His eldest son, Banke Behari Lal, got possession of the cash and securities and handed them over to a "shop" which he and his sons carried on as a joint family, trading under the firm name of "Banke Behari Lal Jai Narain."

It has been held by the two Courts below, the District Judge and the High Court, that Sital Prasad by his will created a trust for public purposes of a charitable or religious nature and that it was not void as being vague or uncertain as to the charities to which it applied. Their Lordships agree with that construction of the will. Having regard to the fact that the bathing ghat might be washed away or damaged by floods in the Jumna and the expenses which might have to be incurred in replacing it or in repairing it, and having regard to the fact that the expenses of maintaining a *dharmasala* would much depend on the number of pilgrims using it, it was a prudent provision of the will, as their Lordships understand it, that one-fourth of the income of the endowment should ordinarily be kept in reserve by the trustees to meet such extraordinary expenses when they should occur. It is quite clear from cl. (*iv*) of the will that no one, except as provided by the will, should have any claim to any part of the income of the *waqf* property.

From 1904 until 1907 the committee appear practically to have done nothing to carry out Sital Prasad's directions. It is doubtful if during that period the committee held any meetings. So far as has been proved the first meeting of the committee was held on the 5th December, 1907. The Committee, however, on the 12th September, 1904, or one of them applied to the municipality of Etawah for permission to construct a bathing ghat on the Jumna and to erect a *dharmasala*. The application to construct the bathing ghat was refused because the committee required the municipality to divert a pucca drain from the land which the committee required for the construction of the ghat. The application for permission to

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erect the *dharmasala* was refused because the committee wanted the Government to grant to them Nazul lands gratis. It may be doubted whether either of those applications was made *bona fide*. Nothing further was done by the committee for the construction of a bathing ghat, and until 1907 nothing further was done by the committee with the object of erecting a *dharmasala* or of providing a building which could be used as a *dharmasala*.

Banke Behari Lal died on the 5th March, 1907, and was succeeded as President of the Committee of Trustees by his second son Rup Narain, and later Lala Jai Narain, defendant 1, was appointed Secretary. On the 14th March, 1907, Banarsi Das and Sheo Narain, two of the younger sons of Sital Prasad, brought a suit against Lala Jai Narain, defendant 1 of this suit, Girwardhari Lal, their then eldest surviving brother, and Gur Narain, the eldest son of Girwardhari Lal. for cancellation of the will of 24th February, 1904, of Sital Prasad and for possession of their share of the estate of Sital Prasad, or in the alternative, if that will should be held to be genuine, an order that the directions contained in that will should be carried out. It may be inferred that the directions given in that will were not being carried out by the committee.

It is now necessary to be considered whether there were any misappropriations of the *waqf* property by the trustees, and if there were, then it is to be considered whether the joint family trading as "Banke Behari Lal Jai Narain" can be made liable to repay any of the moneys misappropriated. The misappropriations which the District Judge and High Court have concurred in finding began in 1907 and ended in 1914, and in the aggregate amounted to Rs. 48,000. Their Lordships agree with the Courts below that these misappropriations for which the trustees are responsible were committed and amounted in the aggregate to Rs. 48,000. These misappropriations began after Banke Behari Lal died and they were committed with the knowledge and assent of Lala Jai Narain, defendant 1, and for those misappropriations of the trust fund their Lordships agree with the Courts below that Lala Jai Narain, defendant 1, is responsible.

After the death of Banke Behari Lal in 1907, the joint family continued to carry on the business which had been carried on in the firm name of "Banke Behari Lal Jai Narain." Whether there was any change in the trading name of the

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joint family after the death of Banke Behari Lal their Lordships do not know. It is immaterial whether there was or not a change in that trading name, and their Lordships will continue to refer to that trading name as the trading name of the joint family. It appears to their Lordships that after the death of Banke Behari Lal his eldest son Lala Jai Narain was the managing member of the joint family. After the death of Banke Behari Lal the joint family continued to hold on behalf of the trustees the moneys of the *waqf* fund which Banke Behari Lal had, on the death of Sital Prasad, deposited with "Banke Behari Lal Jai Narain." Lala Jai Narain, defendant 1, on behalf of the joint family,was a party to the following transactions which affected the trust fund of the trustees in the possession of the joint family. In 1907 some people in Etawah trading in the name of " Durga Prasad and Sital Prasad " owed to " Banke Behari Lal Jai Narain " Rs. 16,000. The debtors were in difficulties, and Lala Jai Narain, defendant 1, repaid that debt to the joint family by transferring Rs. 16,000 from the credit account of the trustees to " Banke Behari Lal Jai Narain " and took a mortgage for Rs. 16,000 in favour of the trustees, thus substituting the trustees for " Banke Behari Lal Jai Narain " as the creditors of " Durga Prasad and Sital Prasad. " Another instance is, the Bharat Bank owed to " Banke Behari Lal Jai Narain " Rs. 10,000. The Bharat Bank got into difficulties and subsequently failed. Lala Jai Narain, defendant 1, on behalf of the joint family transferred that debt to the *waqf* account of the trustees with " Banke Behari Lal Jai Narain."In 1914, after Lala Prag Narain, defendant 2, who was one of the joint family, had become a member of the committee of trustees, a firm trading as " Ram Din and Sital Prasad " owed Rs. 15,000 to " Banke Behari Lal Jai Narain." The debt was unsecured and the debtors were unable to pay it. Lala Jai Narain, defendant 1, in the interests of " Banke Behari Lal Jai Narain " transferred that debt of Rs. 16,000 to the *waqf* account of the trustees. The three instances to which their Lordships have referred represent in the aggregate Rs. 41,000 of the total sum of Rs. 48,000 which was misappropriated, and in their Lordships' opinion for that Rs. 41,000 Lala Prag Narain and Bramha Narain, defendants 2 and 3, as members of the joint family trading in the name of " Banke Behari Lal Jai Narain " are equally responsible in this suit with Lala Jai Narain, defendant 1, but in their Lordships' opinion it has not been proved that the joint family is

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responsible for the balance of Rs. 7,000 of the Rs. 48,000 of misappropriation of the *waqf* fund.

The learned District Judge decreed the suit in the manner following :—

"1. The committee will be reconstituted as follows subject to their acceptance : Lala Sheo Narayan, president ; Lala Prag Narayan, Lala Suraj Narayan, defendants, Lala Gauri Shankar, plaintiff and Babu Dharam Narayan, pleader, Mainpuri, members.

2. The entire property will be put in charge of the said trustees for management on the lines suggested.

3. Lala Jai Narayan will, within three months, furnish full accounts of the affairs of the trust, showing how the capital sum estimated at Rs. 52,000 has been utilised, and also how the interest thereon at a rate fixed by the Court at 4 per cent. per annum has been spent. Neither the transfers to Lala Jai Narayan, himself in lieu of mortgages, *hundis* or other securities can be accepted by the Court, nor can the release to Lala Banarsi Das of Rs. 10,000, with interest thereon be allowed as a charge against the fund. The balance due to the fund on these accounts which are to be furnished will be handed over to the committee in the form of cash or realisable securities.

4. The committee will have full power to carry out the testator's wishes as laid down in the will. They will close the Gracey Hindu School, prepare a scheme of systematic charity and either build a *dharmasala* or some similar institution of a kind approved by this Court.

5. The plaintiffs' costs will be borne by Lala Jai Narayan personally, who will bear his own costs and those of Lala Gur Narayan.

The other defendants will bear their own costs with the proviso that those of the heirs of Lala Banarsi Das will be paid out of the estate of Lala Banarsi Das. Interest at 6 per cent. per annum will be allowed on the costs as usual.

And that the sum of Rs 1,079-2-0 be paid by Jai Narayan, defendant, to the plaintiff on account of costs of this suit with interest thereon at the rate of 6 per cent. per annum from this date to date of realisation.

It is further ordered that Jai Narayan, defendant, do pay Rs 76-8-0 to Gur Narayan, defendant, with interest at 6 per cent. per annum from this date up to the date of realisation and Rs 203-4-0 on account of costs of Suraj Narayan and others, defendants, with interest be charged to the property of Lala Banarsi Das."

From that decree the plaintiffs appealed to the High Court as also did Lala Jai Narain, defendant 1, and Lala Sheo Narain, defendant 8, who so far as his costs only were concerned, filed a cross-objection.

The High Court heard the two appeals together and dealt with them and the cross-objection in one judgment, as the Court was entitled to do. The High Court made the following decree :—

"It is ordered and decreed that the decree of the Judge of Mainpuri be modified to this extent that the direction to Jai Narain to render accounts

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to the new committee be deleted therefrom and instead thereof it is hereby directed that the first three defendants shall pay to the new committee Rs. 48,000 with interest at 4 per cent. per annum from the 5th of March, 1904, to the date of payment, less a sum of Rs 1,308 and shall deliver the houses and the share in the village of Kutubpur to the new committee and that the rest of the said decree be maintained and this appeal and the cross-objection filed by Sheo Narain under O. 41, R. 22 of the Code of Civil Procedure be and they hereby are dismissed.

And it is further ordered that the appellant aforesaid do pay to the respondents Nos. 1 to 3 aforesaid, the sum of Rs (1,331-11-3) one thousand three hundred and thirty-one annas eleven and pies three only, the amount of costs incurred by the latter in this Court.

And it is further ordered that the costs incurred in the Lower Court be paid with interest thereon as awarded by the said Court."

Their Lordships, having considered the facts in the suit and the law which appears to them to be applicable to the facts will humbly advise His Majesty that the appeal of Lala Jai Narain, defendant 1, should be dismissed, but the decree against Lala Prag Narain and Brahma Narain, defendants 2 and 3, should be varied by making the principal sum which they are jointly and severally with Lala Jai Narain liable to pay to the new committee to be Rs. 41,000 with interest at 4 per cent. per annum from the 5th March, 1904, to the date of payment less the sum of Rs. 1,308 and that the rest of the decree of the High Court should stand. Lala Jai Narain must pay two-thirds of the costs of the respondents in these consolidated appeals, and Lala Prag Narain and Brahma Narain must pay one-third of the costs of the respondents in these consolidated appeals, as the variation of the decree of the High Court which their Lordships advise should be made was not suggested by them or on their behalf, and they have made no payment into Court, and have resisted the claim of the plaintiffs from the first.

Before concluding, their Lordships must refer to a matter which has caused much trouble in the preparation of the advice which they will humbly offer to His Majesty.

In the judgment delivered by the learned Judges of the High Court they correctly said :—" The two appeals Nos. 140 and 241 of 1916 are connected and arise out of a suit brought under S. 92 of the Code of Civil Procedure." In the case which was filed in this appeal on behalf of Lala Jai Narain, his counsel stated :—" Against the said decree of the District Judge, Jai Narain and the plaintiffs both appealed to the High Court." In the case which was filed in this appeal on behalf

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of Lala Prag Narain and Lala Brahma Narain their counsel stated : "The 1st defendant, Jai Narain, appealed from the said decree of the District Judge to the High Court of Judicature at Allahabad, and the plaintiffs filed cross-objections in regard to costs." No copy of the appeal which presumably was filed by the plaintiffs appears in the record which is before their Lordships, and the cross-objections in regard to costs which were in fact filed were filed not by the plaintiffs, but by the defendant Lala Sheo Narain. In the case which was filed in this appeal on behalf of two of the plaintiffs by another counsel it is stated : "Lala Jai Narain alone appealed to the High Court against the decree of the learned District Judge, and impleaded as respondents the plaintiffs and the defendants who had not appealed." Such contradictory statements as to matters which were of record very rarely occur in cases filed in appeals to His Majesty in Council, but in the present case the contradictory statements and the absence from the record before their Lordships of a copy of the memorandum of appeal to the High Court of the plaintiffs who did appeal to that Court must be the results of negligence for which persons in India are presumably responsible. Their Lordships must accept as correct the statement of the learned Judges of the High Court in their judgment that there were two appeals before them, but they observe that only one decree is included in the printed record, and that was in Appeal No. 140 of 1916 of Lala Jai Narain.

Solicitor for appellant (Jai Narain) in Appeal No. 77 of 1922 : *E. Dalgado.*

Solicitor for appellants (Prag Narain and others) in Appeal No. 78 of 1922, and respondents in Appeal No. 77 of 1922 : *H. S. L. Polak.*

Solicitor for respondents (Ujagar Lal and another) in both appeals : *Douglas Grant.*

A. de M. *Decree varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Sri Toleti Satyanarayanamoorthi . . *Petitioner** (*Petitioner-defendant*)

v.

Jayanti Butchayya ... *Respondent* (*Respondent-plaintiff*).

Satyanarayanamoorth v. Butchayya.

Civil Procedure Code, O. 23, R. 3 and O. 43, R. 1—Order recording compromise—Decree in accordance therewith—Factum of compromise disputed—Appeal.

Where a compromise alleged to have taken place between the parties to a suit is recorded by the Court on an application under O. 23, R. 3 of the Civil Procedure Code and a decree is passed thereon, an appeal lies from the order recording the compromise at the instance of the party who denies the truth of the compromise.

Alamelu Ammal v. *Rama Aiyar,* 43 M L J 290 doubted.

Govindasami v. *Kali Perumal,* (1922) 16 L W 155 followed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Subordinate Judge of Cocanada in C.M.A. No. 6 of 1922 preferred against the order of the Principal District Munsif of Cocanada in I. A. No. 109 of 1921 in O. S. No. 509 of 1920.

P. Somasundaram for petitioner.

K. S. Krishnaswami Aiyangar and *A. Satyanarayana* for respondent.

The Court delivered the following

JUDGMENT :—In the case from which this revision petition arises the petitioner was the defendant. He filed an application under O. 23, R. 3, for recording a compromise alleged to have taken place between him and the plaintiff to be recorded. The Court of first instance found for the compromise and passed an order for its being duly recorded. On appeal the Subordinate Judge disbelieved the case for the defendant and found that the fact that there had been a compromise was not satisfactorily established and dismissed the petition of the defendant. Before me it has been sought to be urged by the learned vakil who appeared for the petitioner that the plaintiff had no right of appeal to the Lower Appellate Court because the order passed by the Court of first instance became merged in the preliminary decree passed at the same time by the Court.

*C R P No. 201 of 1923. 28th October, 1924.

Reliance was placed for that position on the decision in *Alamelu Ammal* v. *Rama Aiyar* (1). There the learned Judges, Oldfield and Venkatasubba Rao, JJ., observed as follows :— "The order in question is one regarding a compromise between the parties. Decree in terms of that compromise was passed later. It is impossible to see how there can be an appeal against the order when it has become merged in the subsequent decree." It seems to me that, with all respect, the correctness of that decision is open to doubt. However that may be, for the purposes of the present case it is enough to say that the learned Judges thought that the fact that the decree in terms of the compromise was passed later was a point of distinction. In this case the decree was passed immediately and as part of the order recording the compromise. I may refer here to the case of *Govindasami* v. *Kali Perumal* (2), where Sadasiva Aiyar and Coutts Trotter, JJ., held that even when there was a decree passed according to the terms of the compromise an appeal would properly lie against the order recording or refusing the compromise. A similar view has been taken in *Megh Raj* v. *Tulsi Ram* (3). In *Paban Sardar* v. *Bhupendra Nath Nag* (4), Jenkins, C. J. and Chatterjee, J. have laid down that the omission by the Court of first instance to make a formal order recording the compromise, but merely passing a decree in accordance with the terms of the compromise was irregular, because it had the effect of depriving the parties of the statutory right of appeal against the order given by cl. (*u*) of O. 43, R. 1. Therefore I am satisfied there is no foundation for the objection taken, namely, that the appeal to the Lower Appellate Court was not competent. In this view there is no other question of jurisdiction before me.

The learned vakil has drawn my attention to certain facts and circumstances which go to show that the Lower Appellate Court might have conceivably gone wrong in its appreciation of the evidence. But sitting here in revision I have no right to interfere with the conclusion of fact arrived at by the Lower Appellate Court.

The revision petition is accordingly dismissed with costs.

A. V. V. *Petition dismissed.*

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1. (1922) 43 M L J 290.
2. (1922) 16 L W 155.
3. (1924) 6 Lah. L J 187.
4. (1915) I L R 43 C 85.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Narikkote Kunnamangalath Ittisseri Kuberan Nambudri ... *Petitioner** (*Respondent-defendant*)

v.

Pothera Kalloor Koman Nair ... *Respondent* (*Petitioner-1st defendant*).

Kuberan Nambudri *v.* Koman Nair.

Civil Procedure Code, S. 10—Stay of suit—"Matter in issue," meaning of—Two suits involving a common issue—If section applicable.

The expression "matter in issue" in S. 10 of the Civil Procedure Code has reference to the entire subject in controversy between the parties and the mere fact that one of the issues in two suits is common is not sufficient to attract the operation of S. 10 of the Civil Procedure Code.

Sreeramulu v. *Sreeramulu,* 15 L W 646 followed.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Taliparamba in M. P. No. 2179 of 1923 in O. S. No. 82 of 1918.

T. S. Viswanatha Aiyar for petitioner.

O. T. Govindan Nambiar for respondent.

The Court delivered the following

JUDGMENT :—This is a Civil Revision Petition by the plaintiff in O. S. No. 82 of 1918 on the file of the District Munsif's Court of Taliparamba. The suit was for redemption of certain lands by the plaintiff, and one of the issues raised was whether the plaintiff who claimed under an adoption had been validly adopted. It appears that in a previous action between the plaintiff and the first defendant the same issue had been raised and is now pending disposal in an appeal before the District Judge of South Malabar having been remanded after a second appeal by this Court. The defendant in this suit put in an application to the District Munsif's Court under S. 10 of the Civil Procedure Code for staying the trial of this suit pending the disposal of that appeal which is still pending. The District Munsif made an order of stay. I think the order of the District Munsif was wrong. Under S. 10 of the Code of Civil Procedure it is necessary that the matter in issue must be directly and substantially in issue in both the suits. The learned counsel for the respondent

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*C R P No. 78 of 1924. 21st October, 1924.

Kuberan Nambudri v. Koman Nair.

argued that the expression "matter in issue" should be construed as meaning merely the main question involved in the suit, and his contention was that as the issue relating to the adoption was the main question in that suit as well as in the present suit the order of the District Munsif was right. But I do not think that the expression "matter in issue" can be so construed.

I believe the real intention of the Legislature in framing S. 10 of the Civil Procedure Code was merely to prevent later suits relating to the same subject-matter being tried before an earlier suit relating to the same subject-matter is tried and disposed of. Otherwise the result will be that if any issue should be common to two suits the later suit could never possibly be disposed of before the earlier suit. But we know that the law recognises that the decision even in a later suit may operate as *res judicata* in a suit which has been really instituted previously. There is also direct authority for the position reported in *Sreeramulu* v. *Sreeramulu* (1), where Mr. Justice Venkatasubba Rao construing this very section has, after referring to the previous decisions, come to the conclusion that the expression "matter in issue" in S. 10 has reference to the entire subject in controversy between the parties. The order of the District Munsif is set aside and the petition is allowed. The respondent will pay the petitioner's costs in this Court.

A. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE SRINIVASA AIYANGAR.

Dewan Bahadur Govindoss Chaturbhujadoss ... *Appellant** (*Plaintiff*)

v.

N. Ramadoss ... *Respondent* (*Defendant*).

Govindoss Chaturbhujadoss v. Ramadoss.

Presidency Towns Insolvency Act of 1909, Ss. 30, cl. (2), 21, 23, 45—Insolvency—Composition sanctioned by Court and adjudication annulled in consequence thereof—Secured creditor whose name included in schedule to composition deed not paid debt according to composition rate—Value of security insufficient to make up amount of his debt at composition rate—Remedy of such creditor—Suit by him to recover deficiency—Maintainability—S. 30, cl. (2), if a bar to.

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*O S Appeal No. 85 of 1923. 13th November, 1924.

1. (1922) 15 L W 646.

Govindoss Chatur-bhujadoss v. Ramadoss.

The plaintiff and appellant was a secured creditor of the first defendant and respondent, who had pledged with the appellant certain jewels as security for a loan of Rs. 12,000. The respondent was, subsequent to the pledge, adjudicated an insolvent. In the course of the insolvency proceedings, the statutory majority of the respondent's creditors agreed to a composition of 8 annas in the rupee, and thereupon the respondent applied to the Court for the annulment of his insolvency on the representation that he had paid all his creditors the composition agreed to. The Court sanctioned the compromise and annulled the adjudication. There was no provision in the composition arrangement which was capable of being enforced on application to the Bankruptcy Court, and no property of the insolvent was in the hands of the Official Assignee.

The appellant was one of the creditors whose names were entered in the composition deed. He had, however, received no notice from the Official Assignee, and the adjudication was annulled before the appellant who had not even realised his security, could prove his debt in insolvency or could take any steps to have it proved in any of the ways indicated by the rules relating to secured creditors. Notice of the application for annulment was also not given to the appellant or any other secured creditor.

In a suit brought by the appellant, who had not even realised his securities, for the sale of the same by or under the directions of the Court and for the recovery of the balance due to him after deducting the value of the securities, *held,* (1) that the appellant was entitled to recover the deficiency in his debt at the rate agreed to under the composition, after crediting the proceeds realised by the sale of the securities ; and (2) that he had a right to bring a separate suit for the purpose, and was not left to his remedy under S. 30, cl. (2) of the Presidency Towns Insolvency Act of 1909.

Per Srinivasa Aiyangar, J. :—Though a composition sanctioned by the Court is binding on all the creditors of the insolvent, including the creditors who were not parties to the composition, the composition takes effect and operates to discharge the insolvent from his liability on the debt only if the compensation agreed to is paid or else a scheme is outstanding under which the creditors are required to proceed and obtain relief. In default of such payment and in the absence of such a scheme, the obligation is laid on the insolvent debtor to pay to all the creditors whose debts are provable in insolvency the amount or the balance of their debt according to the composition, and he is not entirely discharged from all liability merely on the Court approving of a composition and annulling the adjudication.

Cl. (2) of S. 30 of the Presidency Towns Insolvency Act of 1909 is merely enabling, and does not exclude the jurisdiction of the ordinary Courts. Further the clause refers obviously to cases where there is something in the provisions of the composition or scheme which are capable of being enforced in the Bankruptcy Court.

On Appeal from the judgment of the Hon'ble Mr. Justice Coutts-Trotter, dated the 14th August, 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 720 of 1922.

C. V. Anantakrishna Aiyar and *K. Doraiswami Aiyangar* for appellant.

A. Ramachandra Aiyar for respondent.

Govindoss Chaturbhujadoss v. Ramadoss.

Spencer, J.

The Court delivered the following

JUDGMENTS :—*Spencer, J.* :—Appellant, Dewan Bahadur Govindoss Chaturbhujadoss, plaintiff in the Trial Court, was the secured creditor of the respondent, N. Ramadoss, first defendant in the Trial Court, who pledged with him, through his agent, the second defendant, certain jewels as security for a loan of Rs. 12,000. Respondent was adjudicated insolvent on 20th September, 1921. The appellant got no notice from the Official Assignee and before he attempted to prove for the balance of what was due to him, the adjudication was annulled on 20th February, 1922. Appellant brought this suit to recover the balance due to him after deducting the value of his security, which he has since realised.

The learned Judge held that he was not entitled to anything and dismissed the suit against this defendant. He acted upon first impressions as there is no decided case in this country as to the rights of a secured creditor to recover the balance of any debt which he has failed to prove in insolvency when the adjudication has been annulled owing to the debtor having compounded with his other creditors. The learned Judge quoted the case of *Flint* v. *Barnard* (1) as being an authority for the principle that the effect of a composition between a debtor and his creditors is the same as the effect of a discharge, *viz.*, that it releases a debtor from all debts provable in bankruptcy. If I rightly understand that decision, it only decided what are debts provable in bankruptcy and included among them liabilities which mature into debts due after acceptance of compensation.

In this country the position of an insolvent whose adjudication has been annulled is not the same as that of a discharged insolvent. The Presidency Towns Insolvency Act gives the effect of an order of discharge in S. 45. An order of discharge releases an insolvent from all debts provable in insolvency except certain debts of a special nature, such as debts owing to the Crown. An adjudication may be annulled either under S. 21 when it is found by the Court that a debtor ought not to have been adjudged insolvent, or where it is proved that all his debts have been paid in full, or it may be annulled under S. 30 when a proposal of composition has been accepted by a majority of his creditors. The effect of annulment appears in S. 23 which states that the property of the

1. 22 Q B D 90.

Govindoss Chaturbhujadoss v. Ramadoss.

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debtor shall vest in such person as the Court may appoint, or, in default of such an appointment, shall revert to the debtor, to the extent of his interest therein. In Bombay there are rules for the vesting of the property in a person appointed by the Court. Here, as there are no such rules and no such appointment has been made, the property must necessarily revert to the debtor.

In the present case there was no regular scheme of composition laid before the Court but the insolvent filed an affidavit in Court affirming that all the creditors had agreed to accept eight annas in the rupee and had been paid at that rate. As there is no provision for composition which can be enforced under S. 30, cl. (2), no property of the insolvent is in the hands of the Official Assignee, and no proceedings are now pending in the matter of the insolvency of N. Ramadoss, it would be futile for us to refer the creditor to the Court of Insolvency for his remedy. He has brought this suit for the whole of the balance that is due to him, but being one of the creditors, whose names were entered in the schedule (Ex. J) a majority of whom agreed to accept eight annas in the rupee, he is bound by the result of the composition approved by the Court, for S. 30, cl. 1 says that upon an order being made annulling the adjudication the composition or scheme shall be binding on all the creditors so far as it relates to any debt due to them from the insolvent and provable in insolvency. The appellant's claim for the unsecured balance was provable in insolvency though not actually proved, as the adjudication was annulled before he got notice and came to prove for the balance. In *Edwards* v. *Coombe* (2) the rights of general action of a creditor whose name does not appear in the statement of composition were held not to be taken away by S. 126 of the Bankruptcy Act of 1869 which provided as follows :—

"The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of debts due to whom are shown in the statement of the debtor, produced to the meetings at which the resolution was passed, but shall not affect or prejudice the rights of any other creditors."

Under the same Act in *In re, Bestwick : Ex parte Bestwick* (3) creditors who failed to prove their debt in composition proceedings were allowed to come in after realising their security and claim the balance at the rate at which composi-

2. 7 Common Pleas 519. 3. 11 Chan 485.

Govindoss Chaturbhujadoss v. Ramadoss.

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tion was accepted. In the Bankruptcy Act of 1883 this provision was not repeated, but S. 18, cl. 8 of that Act provided :

> "A composition or scheme accepted and proved in pursuance of this section shall be binding on all the creditors so far as it relates to any debts due to them from the debtor and provable in bankruptcy."

Assuming that a creditor might enforce the original agreement or resolution by a summary application to the Court of Bankruptcy, it is clear from these decisions that the jurisdiction of Courts of Common Law has not been ousted thereby. In the last quoted of these decisions it is stated that a creditor may wait till he realises his security, but in any case the debt will not be discharged until the amount of composition is paid. It was held by the Court of Chancery in *In re, Hardy : Hardy* v. *Farmer* (4) that secured creditors who had not assented to a scheme of composition could bring an action after the death of an adjudicated bankrupt against his estate for the balance of their debt that remained after valuing their security and that although the Court of Bankruptcy had jurisdiction over such a claim, notwithstanding the bankrupt's death, the secured creditors' right of action was not barred. In India too it is provided that under S. 17 of the Presidency Towns Insolvency Act a secured creditor's right of suit is not barred by the making of an order of adjudication.

I think that the plaintiff was clearly entitled to a decree against first defendant for a moiety of the balance that may be found to be due, after deducting from the amount claimed in the plaint, the amount realised by sale of the security, and interest thereon at the contract rate of 1 rupee 3 annas up to the date of the decree (14th August, 1923) of the Court of First Instance.

The appeal is accordingly allowed, but without costs, as in this Court the case has been placed upon a new footing and a decree will be given to the plaintiff (appellant) as I have stated.

The Memorandum of Objections is dismissed.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree that the appeal should be allowed. But it must be observed that the point on which the appeal has been argued before us was not only not argued before the learned Judge at the original trial but does not seem to have been even hinted at. The plaintiff-appellant

4. (1896) 1 Chan 904.

Govindoss Chaturbhujadoss *v.* Ramadoss.

Srinivasa Aiyangar, J.

instituted the suit against two defendants. The first defendant is the only respondent here in appeal before us. The other defendant was the widow and legal representative of one Oggu Guruswami Chetti. This Guruswami Chetti pledged with the plaintiff two diamond *addigais* as security for a loan of Rs. 12,000, carrying interest at Rs. 1-3-0 per cent. per mensem, and as further security gave his own promissory note therefor to the plaintiff. It is now admitted that the two jewels which were so pledged by Guruswami belonged to the first defendant and that the pledge was made and the loan obtained by Guruswami only for and on behalf of the first defendant.

The learned Judge granted a decree against the second defendant, limited to the assets of the said Guruswami in her hands, but dismissed the action so far as the first defendant was concerned.

The ground on which the learned Judge held that the plaintiff was not entitled to a decree against the first defendant is as follows :—" The first defendant had subsequent to the pledge been adjudicated an insolvent, but in the course of the insolvency proceedings the statutory majority of his creditors agreed to a composition of 8 annas in the rupee and thereupon the insolvent, first defendant, applied to the Court for the annulment of his insolvency on the representation that he had paid all his creditors the composition agreed to. The Court sanctioned the compromise and annulled the insolvency. The plaintiff who had not realised his security had not proved his debt in insolvency or taken any steps to have it proved in any of the ways indicated by the rules relating to secured creditors before the insolvency was annulled by the Court. And under some practice for which there seems to be no warrant, no notice of the application for annulment was given to the plaintiff or any other secured creditor. Even when the suit was instituted, the plaintiff had not realised his securities, and one of the prayers in the plaint relates to the sale of the securities by or under the directions of the Court.

The learned Judge referring to the case of *Flint* v. *Barnard* (1) and the case of *Seaton* v. *Lord Deerhurst* (5) held that the annulment following on the composition had the same effect with regard to the insolvent as an order of discharge and that therefore the first defendant became released

1. 22 Q B D 90. 5. (1895) 1 Q B D 853.

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from liability to the plaintiff with regard to any balance that might be found due to the creditor after the realisation of the securities.

The first question therefore that arises in this appeal is whether the annulment of the insolvency in such circumstances has the operation in law of discharging the insolvent-debtor entirely from liability and this will have to be determined apart altogether from any question whether by reason of the plaintiff not having proved the debt in insolvency he has become precluded or debarred from enforcing any remedies and whether the appropriate remedy open to such a creditor would be in the Bankruptcy Court or by separate action. The learned vakil for the appellant did not seriously press the claim of the plaintiff for the payment of the whole amount of the deficiency in the debt after crediting the proceeds realised by the sale of the securities but contended only for the recovery of such deficiency at the rate agreed to under the composition, namely, at eight annas in the rupee. As I understand *Flint* v. *Barnard* (1) it is only an authority for two propositions : firstly, that a composition in the course of the insolvency agreed to by the prescribed statutory majority of the creditors is binding on all creditors of the insolvent whether they were parties to the composition or not ; and secondly, that a debt accrued subsequent to adjudication but before the composition is a debt provable in insolvency. The plaintiff in the action claimed not to be bound by the composition and not liable to proceed to recover his debt under the scheme framed and approved of by the Court for the payment of the creditors. Lord Esher, M. R. properly held that such a debt was a debt provable in insolvency and an agreement in composition bound all the creditors whose debts were debts provable in insolvency. No question, therefore, arose or was decided whether a creditor in those circumstances was or was not entitled to be paid even at the rate agreed to under the composition. It seems to me that it was assumed throughout in that case that the creditor had a right at least to be so paid.

In *Seaton* v. *Deerhurst* (5) the question that arose was whether a judgment-creditor whose debt was rejected on its being attempted to be proved before the trustee in bankruptcy was entitled, merely because he had not received any dividend, to proceed to have execution of his decree. The Court held

1. 22 Q B D 90. 5. (1895) 1 Q B D 853.

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that being a debt provable in bankruptcy and there being a scheme for the payment of all the creditors whose debts were provable in bankruptcy and the debt due to the judgment-creditor being a debt so provable, the trustee in bankruptcy was entitled to reject it as not binding and that the mere fact that his claim was rejected would not give him a right to proceed in execution. The *ratio decidendi* in that case obviously was that a judgment-creditor was not in a better position with regard to the liability to prove his claim before the trustee under a composition arrangement than any other ordinary creditor whose debt was similarly provable in insolvency. In that case there was clearly a trustee appointed under the composition arrangement and the creditors who had not been paid were relegated to their remedies against him. In the present case, however, there has been no arrangement whatever made for the payment of any creditors who might be found not to have been paid the composition agreed to, no amount or property was set apart for that purpose either in the hands of the Official Assignee or any other trustee and not even an undertaking was given by the insolvent-debtor to make any payments under the composition. This case, therefore, is not one in which a claim was made by the plaintiff to any trustee in bankruptcy or composition and properly rejected by him. It is clear that no such claim could have been made, for indeed there is no person before whom such a claim could have been preferred. The case of *Seaton* v. *Lord Deerhurst* (5) is therefore an authority only for the position that if there is a scheme sanctioned by the Court for the payment of a composition to all the creditors the creditors have only the remedy given to them for getting what they can get under the scheme and not otherwise.

In *Edwards* v. *Hancher* (6) there was a composition agreed to of three shillings in the pound for which the insolvent-debtor along with a surety gave a promissory note to the creditor and a receipt was also granted by the creditor purporting to be in discharge of the debt. On the note being dishonoured, it was held that the plaintiffs were remitted to their rights to sue on the original debt. Chief Justice Lord Coleridge held that the actual payment amount arrived at on the basis of the composition is the thing which the creditors resolved to accept and that therefore it is if and when and only

5. (1895) 1 Q B D 853.

6. 1 Com. Pleas Div. 111.

Govindoss Chaturbhujadoss v. Ramadoss. — Srinivasa Aiyangar, J.

if and when that amount is actually paid there is satisfaction of the debt. The Court held that on failure of the payment, the plaintiffs were remitted to their original rights and were entitled to a decree in their action against the defendants. This case was referred to with approval and followed in *In re, Bestwick* : Ex parte *Bestwick* (3) and it was there held that a secured creditor was in no way bound by a compounding debtor's estimate of the value of his security and that he was entitled to abstain from proving the claim or taking any part in composition proceedings and that when he has realised his security he may claim from the debtor payment of the composition on the balance of the debt which may then remain unsatisfied.

On the authority of these two cases we arrive at the conclusion that though a composition sanctioned by the Court is binding on all the creditors of the insolvent including the creditors who were not parties to the composition, the composition takes effect and operates to discharge the insolvent from his liability on the debt only if the compensation agreed to is paid or else a scheme is outstanding under which the creditors are required to proceed and obtain relief. In default of such payment and in the absence of such a scheme, it necessarily follows that the obligation is laid on the insolvent-debtor to pay to all the creditors whose debts are provable in insolvency the amount or the balance of their debt according to the composition. It is inconceivable that in default of any such payment and in the absence of any such scheme or trust for payment, the insolvent-debtor should be entirely discharged from all liability merely on the Court approving of a composition and annulling the adjudication. But that was the contention put forward by Mr. A. Ramachandra Aiyar, the learned vakil for the respondent, if I understood his argument aright. It seems to me that it can scarcely be the law. There are, however, two cases which were relied on and which I may here refer to. In the case of *Gilbey* v. *Jeffries* (7) no doubt Brett, M. R. held that as the composition was binding on the creditor the debtor became discharged. But that was a case in which under the arrangement of composition all the property of the debtor had been transferred to a trustee and the remedy of the creditor obviously was against such a trustee. The case

3. 11 Ch. 485.

7. 11 Q B D 559.

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of *Couldery* v. *Bartrum* (8) was also relied on, but that was a case merely relating to valuation of securities and to the liability under the rules relating thereto of the holder of the security to refund any amount realised by him by the sale of the securities over and above the amount at which he had valued the securities. Thus if the creditor in the circumstances has a remedy, the only question that remains is, what is his remedy? whether it is by way of application to the Bankruptcy Court or by a separate action. In the English Bankruptcy rules there is a specific rule, R. 215, which provides that no action to enforce payment shall lie, but the remedy shall only be by application to the Bankruptcy Courts if default is made in payment under a composition scheme either by the debtor or the trustee. No such rule has been framed in this Court. The only provision of law relating to this matter is contained in clause 2 of S. 30 of Act III of 1909. It is as follows :— " The provisions of the composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court." This is an exact reproduction of clause 10 of S. 18 of the English Bankruptcy Act of the year 1883.

In the case of *Hardy* v. *Farmer* (9) after the death of the bankrupt a secured creditor valuing his security under the rules applied in an administration action for the recovery of the balance due to him. A trustee had been appointed under the composition and objection was taken that no application would lie except to the Bankruptcy Court. Mr. Justice Chitty, having regard to the terms of R. 211 of the Bankruptcy Rules of 1886 which had been passed by that time, which rule was identical in terms with the present R. 215 already referred to, held that the proper remedy was by way of application in the Bankruptcy Court, and the learned Judge apparently adjourned the hearing of the application in the Chancery Court for the purpose of enabling the applicant to move the Bankruptcy Court. In this case two points are clear : firstly, that a trustee had been appointed for the purpose of carrying out the composition ; and secondly that but for R. 211 referred to by the learned Judge which had the force of law and which laid down that no separate action would lie and that the remedy would be by application to the Bankruptcy Court, the learned Judge

8. 19 Ch. D. 395.

9. (1896) 1 Ch. D 904.

would have held he had jurisdiction. In the absence of such a rule in this Court, there is therefore no reason whatever to hold that the right of separate action is precluded or barred.

Further, cl. 2 of S. 30 is merely enabling. It is a summary remedy given by the statute. There are no words there excluding the jurisdiction of the ordinary Courts. In the absence of express statutory provision excluding the jurisdiction of the ordinary tribunals no right of action could be deemed to have been taken away. Furthermore, cl. 2 of S. 30 refers obviously only to cases where there is something in the provisions of the composition or scheme which are capable of being enforced in the Bankruptcy Court. In the present case, however, no such provision would seem to exist capable of enforcement on application to the Bankruptcy Court. On that ground also, therefore, cl. 2 of S. 30 has no application.

The case of *Edwards* v. *Coombe* (2) is a decision which throws considerable light on the question now under discussion. That was in the year 1872. There was then no such rule as the present R. 215 or R. 211 of the Bankruptcy Rules of the year 1886. Justice Willes in that case decided that it was competent to a non-assenting creditor notwithstanding a resolution for composition under S. 126 of the Bankruptcy Act of 1869 to sue for his original debt where the debtor has failed to pay or tender the composition within the time agreed or within a reasonable time, and that the creditor was not restricted to the summary remedy by application to the Courts of Bankruptcy provided by that section. I may here observe that the provision for summary remedy referred to in that section is in terms identical with cl. 2 of S. 30 of the Presidency Towns Insolvency Act of 1909. That learned Judge referring to the summary remedy states that a remedy given in Bankruptcy Courts may be very valuable, that a creditor may avail himself of the course of proceedings if he thinks fit, but his ordinary Common Law remedy still subsists until he elects to avail himself of the powers of the Court of Bankruptcy. At another place in the same judgment that learned Judge observes that it is the composition that has to be accepted and not a mere agreement of the other creditors and that the non-payment of composition was the failure of a condition going to the root of the arrangement and that the original debt remains and may be resorted to notwithstanding the resolution.

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2. 7 Com. Pleas 519.

Govindoss Chaturbhujadoss *v.* Ramadoss.

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The following sentence, however, from the concluding portion of the judgment of Justice Willes may have some bearing and may also require to be considered :—" We dispose of this case without entering into a consideration as to whether it might be more or less desirable that the equitable summary remedy of the creditor should be enforced rather than the ordinary Common Law remedy. "

In spite of the fact that in our judgment the plaintiff-appellant in this case has got a concurrent remedy by separate action, we should have been disposed to refer him to the summary remedy indicated in cl. 2 of S. 30 of the Presidency Towns Insolvency Act on the general principle that the parties should as far as possible be relegated to the remedies provided in special enactments, were it not for the circumstance that there appears to be no provision in the composition arrangement in this case which is capable of any summary enforcement. Any other remedy that may be open to the plaintiff under that Act could scarcely be called summary. It, therefore, follows that there is nothing in the Bankruptcy Law which renders the present suit unsustainable. The plaintiff is clearly entitled to be paid a composition in respect of the balance due to him in the amount of the debt with interest thereon at Rs. 1-3-0 per cent. per mensem from the date of the loan till the date of the decree on the Original Side after giving credit for the sale proceeds of the securities and the learned Judge erred in dismissing the suit entirely against the first defendant.

The decree of the Original Court will, therefore, accordingly be modified and a decree will be passed against the first defendant for the amount of such balance at 8 annas in the rupee, or, in other words, for the moiety of such balance. As the point on which the appellant has now succeeded was not argued before the learned Judge in the Original Court, there will be no order as to the costs of the appeal. The Memorandum of Objections is also dismissed.

A. S. V. *Decree modified : Memo of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE ODGERS.

M. K. Sheik Dawood Saheb ... *Appellant** (*Appellant in S. A. No.* 1711 *of* 1922 *on the file of the High Court—7th plaintiff*)

v.

Moideen Batcha Saheb and others ... *Respondents* (*Respondents* 10 *to* 17 *in do.— Defendants* 1 *to* 8).

Sheik Dawood Saheb *v.* Moideen Batcha Saheb.

Transfer of Property Act, S. 54—*Sale of land in the possession of mortgagee—Delivery of possession—What amounts to—Adverse possession—Change in the character of possession.*

Where property which is the subject of a usufructuary mortgage is sold to the mortgagee in discharge of the mortgage, a direction by the vendor to the vendee to keep the property as absolute owner amounts to delivery of possession. Even if there is no delivery of possession in such a case the possession of the vendee from the date of the sale becomes adverse to the vendor.

Sibendrapada Banerjee v. *Secretary of State for India,* I L R 34 C 207 dissented from.

Kandasami Pillai v. *Chinnabba,* I L R 44 M 253; *Usman Khan* v. *Dasanna,* I L R 37 M 545 relied on.

Appeal under cl. 15 of the Letters Patent against the judgment, dated 7th January, 1924, of the Hon'ble Mr. Justice Krishnan in S. A. No. 1711 of 1922 presented to the High Court against the decree of the Court of the Second Additional Subordinate Judge of Coimbatore in A. S. No. 20 of 1922 preferred against the decree of the Court of the District Munsif of Erode in O. S. No. 1227 of 1920.

Vere Mockett, T. M. Krishnaswami Aiyar and *M. Balasubramania Mudaliar* for appellant.

L. A. Govindaraghava Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The defendant's father obtained by Ex. A (dated 1st August, 1888) a usufructuary mortgage of the suit property as well as a simple mortgage of another property not the subject of the suit. It is now found by the Subordinate Judge—a finding that we must accept—that four or five years after Ex. A, the mortgagor told the mortgagee to take the suit property in lieu of the whole debt of Rs. 75 and therefore he enclosed it by a wall.

*L P Appeal No. 5 of 1924. 14th October, 1924.

Sheik Dawood Saheb v. Moideen Batcha Saheb.

If there was no delivery within the meaning of S. 54 of the Transfer of Property Act, the case is on all fours with *Usman Khan* v. *Dasanna* (1), *Munnigadduv.Maneam Gopalu Reddy* (2) and *Kandasami Pillai* v. *Chinnabba* (3). The defendants having been in possession for more than twelve years, the present suit in 1920 by the plaintiff claiming title from the original mortgagor to redeem is barred. But Mr. Krishnaswami Aiyar argues that there can be no adverse possession, for he argues that part-performance of an agreement to sell, by way of delivery of possession, cannot make the possession adverse and he refers to the Full Bench decision in *Vizagapatam Sugar Co.* v. *Muthurama Reddi* (4). This argument of his involves the anamoly that there was no delivery for the purpose of S. 54, but there was some kind of delivery which amounts to part-performance.

Apart from this anamoly the facts of this case are different from *Vizagapatam Sugar Co.* v. *Muthurama Reddi* (4) where the delivery was in part-performance of an agreement to sell. Here there was an attempt at a sale and the change in the character of possession was in pursuance of such an attempt. Even if there was no difference between the two cases we do not see any reason why the possession obtained in part-performance of an agreement to sell or the possession in its changed character which was the result of an attempted but infructuous sale should not be adverse to the vendor. The principle that possession can be adverse only to a person competent to sue [see *Palaniyandi Malavarayan* v. *Vadamalai Odayan* (5), *Manickam Pillai* v. *Thanikachalam Pillai* (6) and *Nataraja Desikar* v. *Govinda Rao* (7)] does not apply where the change in the character of the possession was by mutual consent [see *Usman Khan* v. *Dasanna* (1), Buswell on *Limitation*, S. 260]. It follows that the defendants perfected a title by prescription. So far we have assumed there is no valid delivery within the meaning of S. 54.

But it seems to us that the delivery in this case satisfies the requirements of S. 54 of the Transfer of Property Act. A direction by the vendor to keep the property as absolute owner amounts to delivery. We agree with the decision in *Muthukaruppan* v. *Muthu* (8). There is no reason to think

1. (1912) I L R 37 M 545 : 23 M L J 360. 2. (1920) 13 L W 400.
3. (1920) I L R 44 M 253 : 40 M L J 105.
4. (1923) I L R 46 M 919 : 45 M L J 528 (F B).
5. (1915) 2 L W 723. 6. (1916) 4 L W 369. 7. (1923) 44 M L J 318.
8. (1914) I L R 38 M 1158 : 27 M L J 497.

Sheik Dawood Saheb v. Moideen Batcha Saheb.

that the word ' delivery ' in S. 54 is used in a peculiar sense or that the words ' places the buyer in possession of the property ' in the 4th clause are intended to alter the legal conception of ' possession ' or of ' delivery. ' ' Delivery ' usually means ' such delivery as the thing to be delivered is capable of. ' Possession cannot be taken to be synonymous with ' occupation ' as has been done in *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (9) with which decision we cannot agree. We observe that though this decision has been referred to in *Bhaskar Gopal* v. *Padman Hira* (10), the two learned Judges referred to it very guardedly and did not expressly approve of it.

We are of opinion (1) that there has been a valid delivery, and (2) if there was no valid delivery the defendants acquired a title by prescription. In either case S. 48 of the Registration Act cannot affect the title of the defendants. The Letters Patent Appeal is dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Mallipeddi Lakshmamma ... *Appellant** (*Plaintiff*)

v.

Mallipeddi Venkatasubbiah and others...*Respondents* (*Defendants* 1 *to* 4).

Lakshmamma v Venkatasubbiah

Hindu Law—Widow—Maintenance—Arrears—Right to.

Where a Hindu widow whose husband died 27 years ago sued for maintenance and for all arrears and she made a demand for maintenance only three years prior to suit, *Held* that the Court had a discretion in the matter of fixing the period for which the arrears should be granted and that in the present case it was sufficient if arrears for three years were granted.

Karbasappa v. *Kallava,* I L R 43 B 66 referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of Bapatla, in A. S. No. 200 of 1921 preferred against the decree of the Court of the Principal District Munsif of Ongole in O. S. No. 275 of 1920.

B. Somayya for appellant.

T. V. Ramanatha Aiyar for respondents.

The Court delivered the following

JUDGMENT :—This Second Appeal arises out of a suit for maintenance and for arrears. The plaintiff is the appel-

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*S A No. 1093 of 1922. 24th October, 1924.

9. (1907) I L R 34 C 207. 10. (1915) I L R 40 B 313.

Laksh-mamma v. Venkata-subbiah.

lant before me in Second Appeal. In the plaint she claimed at the rate of Rs. 15 a month and arrears for six years. Her husband died 26 years before suit. The defendants pleaded that there was an arrangement by which her claim for maintenance was satisfied and also contended that the plaintiff was not entitled to ask for arrears. This arrangement was supposed to be 12 years before suit. Both the Lower Courts found against the arrangement pleaded by the defendants. The District Munsif ought to have framed an issue as to whether the plaintiff was entitled to arrears of past maintenance and how much, if any. It is true that if the defendants want to plead that the plaintiff is disentitled to recover any arrears of maintenance they must plead and prove the circumstances amounting to an abandonment. *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu* (1). But it does not follow that because they have not pleaded such facts the plaintiff is entitled to all the arrears she claims especially in a case where her husband died twenty-six years before suit and when it does not appear, according to the findings of the Lower Appellate Court, that any demand was made prior to three years before suit. Mr. Somayya contends that the evidence of the 1st defendant as the 1st witness contains an admission that there was a demand 12 years before suit and it was followed by an arrangement. But I do not think much can be made of this admission as the arrangement was disbelieved by the Courts below ; and I am inclined to think that the whole of the evidence of the 1st defendant must be found to be false.

The result is we have got in this case a widow whose husband died 27 years ago and a demand is made only three years prior to suit. In these circumstances I think a discretion remains with the Courts, while not disallowing totally the arrears claimed by the plaintiff, to cut down the period for which arrears may be granted. *Vide* Judgment in A. S. No. 75 of 1922. In such a case, if the plaintiff is anxious to get the whole of the amount, I think it is for her to adduce evidence that she was in need of those arrears. See *Karbasappa* v. *Kallava* (2). I do not think that the plaintiff has been prejudiced in this particular case owing to the absence of an issue as to the arrears of maintenance. Having regard to all the

1. (1900) I L R 24 M 147 (P C).
2. (1918) I L R 43 B 66.

Lakshmamma v. Venkatasubbiah.

facts of this case I am not inclined to vary the order of the Courts below wherein arrears have been allowed only for three years.

The next question argued by Mr. Somayya is the rate of maintenance. I think this is entirely in the discretion of the Courts below and this Court in Second Appeal should not interfere unless it appears that the discretion has been very perversely exercised which does not seem to be the case here. There is no reason to interfere with the rate of Rs. 12 per mensem.

The third point argued by Mr. Somayya is that his client ought not to be made to pay the proportionate costs of the defendants in the Courts below. This point is conceded by the vakil for the respondents and has to be allowed.

The result is the Second Appeal will be allowed by declaring that the plaintiff will not be liable to pay the proportionate costs of the defendants in the Courts below. She will be entitled to recover only the proportionate costs incurred by her.

In Second Appeal the parties will give and take proportionate costs, but the plaintiff will not get the printing charges for printing the documents.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

T. C. Xavier ... *Petitioner** (*Counter-Petitioner*)

v.

E. C. Joseph ... *Respondent* (*Petitioner.*)

Xavier v. Joseph.

Municipal election—Voting by ballot—Voting papers—Striking out name of a candidate—Marks on the voting paper other than cross-mark—Cross-mark placed midway between the names of two candidates—Effect on vote.

The fact that at a Municipal election a voter struck out the name of the candidate for whom he did not vote does not vitiate the vote. Similarly the writing of something on the voting paper other than a cross-mark would not vitiate the vote, unless the writing is a mark by which the voter may be afterwards identified. Where in a voting paper the cross-mark is placed just midway between the names of two candidates, it is not possible to say whether the vote has been cast in favour of one candidate or the other. If the intersecting point of the cross is visibly above or below the dividing line, it is easy to gather the intention of the voter.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise

*C R P No. 548 of 1923. 23rd October, 1924.

Xavier v. Joseph.

the order of the Subordinate Judge of Cochin dated 31st March, 1923, in O. P. No. 4 of 1922.

T. M. Krishnaswami Aiyar and *D. A. Krishna Variar* for petitioner.

T. R. Ramachandra Aiyar and *V. Subramania Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The respondent in election petition O. P. No. 4 of 1922 before the Subordinate Judge's Court at Cochin was declared by the returning officer as the candidate duly elected for B ward in an election held for that ward in Cochin Municipality. The petitioner Mr. Joseph filed a petition for having it declared that the respondent's election was not valid and that it should also be declared that he was the person properly elected by the constituency at the election held. A civil revision petition has been filed in this Court on behalf of the respondent to revise the order of the Subordinate Judge by which he declared that the petitioner was the person who was duly elected and that the declaration that the respondent was the duly elected candidate was wrong.

To begin with, I am far from satisfied that on the facts of this case a revision petition under S. 115, Civil Procedure Code, is competent. There is no question which can be said to be a question of jurisdiction or of any material irregularity in the exercise of jurisdiction by the Subordinate Judge. There may be cases where the mistakes committed by the Lower Court are so varied and so numerous as almost to amount to material irregularity in the exercise of jurisdiction, but this is not such a case and I am not called upon to express any opinion with regard to the possibility of a civil revision petition in such cases. I have been referred to the decision of Krishnan and Venkatasubba Rao, JJ., in the case of *Ramaswami Goundan* v. *Muthu Velappa Goundan* (1). So far as that case was concerned it would appear that the Lower Court declared the petitioner duly elected without giving any one an opportunity to show that his election was valid or invalid. The other observations in the course of the judgment regarding jurisdiction assumed by misconstruing a rule were apparently not necessary for the decision of that case as apart therefrom the Court was found to have jurisdiction. However, I am informed that this very

1. (1922) 44 M L J 1.

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question of the right of this Court to interfere in revision is now pending before the Full Bench of this Court. Anyhow in the view I have taken of the merits in this case, it has become unnecessary for me to express any decided view with regard to the extent of the jurisdiction of this Court to interfere in revision in such election cases.

The petitioner in this Court was by the returning officer declared to have received 100 votes and the respondent 98 votes. The Subordinate Judge allowed the respondent five more votes out of the votes found by the returning officer to be invalid and refused to be counted by him for the respondent. This made the total number of votes in favour of the respondent 103. To the 100 votes obtained by the petitioner, one vote was added, namely, that of a person alleged to have been a minor but whose name was found included in the list of voters for the constituency. From the total so made up, namely, 101, two votes were deducted by the Subordinate Judge on the ground that one of those was a case of voting by false personation and another was a vote granted by a person who according to the list was no voter at all but whose official description happened to correspond with that given in the list. We therefore have as a result of these additions and subtractions made by the Subordinate Judge 103 votes in favour of the respondent and 99 in favour of the petitioner. Mr. T. M. Krishnaswami Aiyar, the learned vakil for the petitioner, has addressed considerable argument with regard to every one of the five votes and contended that all those five votes were wrongly included in the votes for the respondent and should have been rejected by the Subordinate Judge.

I shall now deal with these five votes. With regard to one of these five votes, the objection to its being counted is that the name of the candidate for whom the vote was not cast seems struck out on the voting papers. This has been held not to invalidate the vote. Another vote shows that under the cross-mark made on the voting paper against the name of the respondent there appears a tracing of some letters which we cannot make out. From the voting papers it is clear for whom the voting was intended and I cannot say that the other marks on the voting paper are marks from which the voter may be identified. The third voting paper to which objection has been raised is the paper on which the cross-mark

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seems to be placed just midway between the names of two candidates. It has been argued by Mr. T. R. Ramachandra Aiyar that the intersecting angle is placed above the dividing line and that therefore the vote must be counted in favour of his client, the respondent. I have no doubt whatever that if the intersecting point was undoubtedly above the line and visibly so there could be no doubt that it ought to be counted for the respondent. But though it does appear to be slightly above the line, substantially the cross-mark is really bisected by the line between the names of the candidates and I am unable to gather from the mark any clear intention of the vote having been cast in favour of one candidate or the other. That vote would have to be excluded from the votes counted by the Subordinate Judge in favour of the respondent. The remaining two voting papers have been objected to by the learned vakil for the petitioner, on the ground that in the one there is some Tamil writing and in the other there is the English letter C written on the voting papers in addition to the cross-mark. Such writing would invalidate the vote only if it should be found that the writing is a mark by which the voter may be afterwards identified. For all these positions indicated by me. the leading case of *Woodward* v. *Sarsons* (2) is the leading authority. So far as any writing on the voting paper is concerned, which is attacked on the ground that it is a mark by which the voter may be identified, it seems to me that it must be either a mark which on the face of it shows or may show the person who has voted or with regard to which there is evidence on the record which shows that the mark was put in there by some pre-arrangement or conspiracy by reason whereof by looking at the mark one will be in a position to say that it is the vote of such and such a person. No doubt there may also be other cases where from the very nature of the mark we may be able to infer the intention on the part of the person who put the mark there that the voter should or may be identified. In the case of such marks also the Courts would have no hesitation in declaring against the vote if such intention could be gathered from the mere appearance of the writing. In the case of the two votes I am now considering it is clear that the writing alone is not sufficient to identify the voter, because in the one case though it appears to be a Tamil writing one cannot even be sure that

2. 10 C P 733.

Xavier v. Joseph.

it is any particular letter. In the other case no doubt there is the English letter C but I consider that being only a single and such a simple letter, it is not sufficient to form the ground of the identification of the writing of any person. I am unable to say that there is anything in the appearance of these marks from which I can reasonably infer that there was the intention on the part of the person making them that the voter or writer should be identified. In the result, therefore, one out of the five votes added by the Subordinate Judge to the votes obtained or declared to have been obtained by the respondent would have to be excluded from the count. Thus the total number of votes obtained by him would be 102. Mr. Krishnaswami Aiyar further argued that one of the votes recorded for the respondent has been proved in the Court below to have been recorded by a person whose name was not in the list. The learned Subordinate Judge has found that there has been no false personation with regard to that vote and I have not felt persuaded that the person who cast the vote was any other than the person who was entitled to vote. Remembering that in the evidence this particular person calls himself Parameswara Aiyar and that in the list he is called Easwara Aiyar, I am not prepared to say that the difference in the names was not due only to some mistake with regard to the name of the same individual. There is no reason to suppose that any case of false personation has been established. Seeing therefore that the votes according to my findings which are recorded in favour of the respondent total up 102, it seems to me unnecessary to consider the question of the votes with regard to the petitioner, because taking them at the highest the total is 101. It is therefore unnecessary for me to discuss the question of the two cases of false personation which were found against him by the Subordinate Judge and with regard to which Mr. Krishnaswami Aiyar has addressed arguments to me to show that the findings of the lower Courts are wrong. Having therefore come to the conclusion that even on a careful scrutiny of the votes by me the finding of the Subordinate Judge is correct, there is no reason for me to interfere.

The Civil Revision Petition is accordingly dismissed with costs.

A. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE SRINIVASA AIYANGAR.

P. Balamani Ammal ... *Appellant* in both (1st Defendant in Appeal No 348 of 1921 and petitioner in C. M. A. No. 137 of 1922)*

v.

K. N. Rama Aiyar and others ... *Respondents in Appeal No. 348 of 1921 (Plaintiff and defendants 2 to 8)*

K. N. Rama Aiyar ... *Respondent in C. M. A. No. 137 of 1922 (Respondent).*

Balamani Ammal *v.* Rama Aiyar.

*Mortgage—Suit to enforce—Purchase of mortgaged property by plaintiff in execution of money decree against mortgagor during pendency of—Effect—Plaintiff's right to prosecute suit thereafter—*Ex parte *decree against mortgagor subsequent to sale but before its confirmation—Appeal by him against—Maintainability—Appeal in* forma pauperis*—Appeal allowed—Court-fee payable to Government—Order directing same to be paid by appellant and respondent in equal moieties—When made.*

The plaintiff, claiming to be assignee of two mortgages executed by the 1st defendant, sued to enforce the same. The 1st defendant filed a written statement contesting the claim *in toto*. Pending the suit the plaintiff purchased in Court-auction held in execution of a money decree passed against the 1st defendant the right, title and interest of the 1st defendant in the suit properties. The purchase was on 3rd March, 1921, and the sale was confirmed on 25th October, 1921, an application by the 1st defendant to set aside the sale having been dismissed. The suit itself came on for hearing on 6th August, 1921, while the 1st defendant's application to set aside the sale was pending, and the Court below passed an *ex parte* decree for the sum claimed against the 1st defendant.

On an appeal preferred by the 1st defendant against the *ex parte* decree, the plaintiff took a preliminary objection to the maintainability of the appeal, his contention being that the effect of his purchase of the suit properties in execution of the money decree was that besides being a respondent he took also the place of the appellant, and that the appeal could not, therefore, go on and must be dismissed.

Held, that by reason of the plaintiff's purchase on 3rd March, 1921, his mortgage became satisfied on that date and that the suit ought therefore to have been dismissed on 6th August, 1921, by the Court below.

The appeal was accordingly allowed and the suit dismissed.

The plaintiff had filed the appeal in *forma pauperis*. In the circumstances of the case the Court-fee payable to the Government was directed to be paid by the plaintiff and the 1st defendant in equal moieties.

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*Appeal No. 348 of 1921 and A A O No. 137 of 1922. 10th October, 1924.

Balamani Ammal v. Rama Aiyar.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 109 of 1919.

and

Appeal against the Order of the Court of the Subordinate Judge of Kumbakonam dated 28th October, 1921 in Interlocutory Application No. 517 of 1921 in Original Suit No. 109 of 1919.

T. K. Rangaswami for appellant.

T. M. Krishnaswami Aiyar for respondents.

The Judgment of the Court was delivered by

Venkata Subba Rao, J.

Venkatasubba Rao J. :—The plaintiff brought the suit to enforce two mortgages which he alleged were executed by the 1st defendant in favour of certain third parties from whom he obtained assignments of those mortgages. The 1st defendant filed a written statement denying that any part of the sum of Rs. 31,921-7-8 for the recovery of which the suit was filed was due and making various charges of gross fraud against the plaintiff. On the 6th August, 1921, the case came on for hearing when the 1st defendant's vakil applied for an adjournment on certain grounds to which we shall presently refer, but the adjournment was refused. The vakil then said he had no instructions and the Subordinate Judge passed an *ex parte* decree for the sum claimed against the 1st defendant. We are not concerned with the other defendants but we may mention that the 2nd and 3rd defendants were impleaded as subsequent mortgagees and that the 9th defendant obtained an assignment subsequent to the suit of the 2nd defendant's mortgage. The 1st defendant has filed this appeal.

Mr. T. M. Krishnaswami Aiyar, the vakil for the plaintiff-respondent, has taken an objection *in limine* to the maintainability of the appeal. He contends that his client has become the purchaser of the 1st defendant's interest in the property and that as the effect of it would be that besides being a respondent his client takes also the place of the appellant, the appeal cannot go on and must be dismissed.

Before examining this contention, we shall first deal with the appeal as if no such event has taken place. The present suit was filed on the 10th of December, 1919, and during its pendency the plaintiff purchased in Court-auction held in execution of a money-decree passed against the 1st defendant, the right, title and interest of the 1st defendant in the suit properties. The purchase by him was on the 3rd March, 1921. The

1st defendant thereupon made an application to the District Munsif's Court, Kumbakonam, which held the auction, to set aside the sale on certain grounds. This application was pending on the 6th of August, 1921 when the present suit came on for hearing. The 1st defendant's vakil applied for an adjournment on the ground that he was led to believe that the suit would not go on till the petition to set aside the sale was finally disposed of, that, as a matter of fact, the application before the District Munsif's Court came on for hearing on the 3rd of August, 1921, but was adjourned to the 31st of August in order that the parties might take the necessary steps to get the application transferred to the Sub-Court, Kumbakonam, so that the suit and the application might be heard together and that for these reasons his client who was ready to proceed with the suit on previous occasions had not taken the necessary steps to be ready with her evidence on that day. The 1st defendant was not in Court, the Judge refused the application for adjournment and passed an *ex parte* decree. The 1st defendant thereupon made an application to set aside the *ex parte* decree. That application was again refused. The 1st defendant has not only filed an appeal against the decree itself (Appeal No. 348 of 1921), but she has also filed an appeal against the order refusing to set aside the *ex parte* decree (A. A. O. No. 137 of 1922). We are clearly of the opinion that the Subordinate Judge ought to have granted the adjournment prayed for. The vakil for the plaintiff as well as the vakil for the 1st defendant gave evidence when the application to set aside the *ex parte* decree was heard and the 1st defendant's vakil deposed that the vakil for the plaintiff had represented to the Court at a previous hearing that the suit might be adjourned pending the disposal of the execution application in the District Munsif's Court. This statement was no doubt denied by the plaintiff's vakil. But without deciding which of the two conflicting versions is correct, we are satisfied that the defendant's vakil *bona fide* believed that the case would not be heard on the 6th of August and had sufficient grounds for entertaining that belief. When the petition to set aside the sale was taken up on the 3rd August 1921 by the District Munsif, it is clear that it was adjourned to the 31st August in order to enable the parties to get the petition transferred to the Sub-Court. Whether this suggestion regarding the transfer emanated from the 1st defendant's vakil or was made by the Court is immaterial. These facts show that the

Balamani Ammal v. Rama Aiyar. Venkatasubba Rao, J.

1st defendant could have honestly and *bona fide* come to the conclusion that it was not necessary to be ready to proceed with the case on the 6th August. If nothing further has transpired we would have no hesitation in reversing the decision and remanding the suit for trial.

But Mr. Krishnaswami Aiyar contends that inasmuch as he himself became the purchaser of the equity of redemption the appeal must be dismissed. The Court sale was on the 3rd of March 1921. It was confirmed by the Munsif on the 25th October, 1921. It is unnecessary to refer to the subsequent history of this dispute for it is sufficient to say that the result of all that happened was, that the confirmation made by the Munsif was allowed to stand. O. 21, R. 92, Civil Procedure Code, says that where an application to set aside a sale is made and disallowed the Court shall make an order confirming the sale and thereupon the sale shall become absolute. Under S. 65 of the Code where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. The property therefore became vested in the plaintiff on the 3rd of March, 1921. Now let us see what the argument of Mr. Krishnaswami Aiyar leads to. He says that his client became the purchaser of the 1st defendant's interest and the appeal should be, therefore, dismissed. In other words, he says that his mortgage has become satisfied by reason of the purchase. The logical deduction from this would be, that if on the 3rd March, 1921. his mortgage became satisfied and he had no claim to prosecute, the suit ought to have been dismissed on the 6th of August, 1921 when the Sub-Judge delivered judgment. The plaintiff contends that during the pendency of the suit as the result of an event that happened, the mortgagor's interest in the property passed to him and this operated to discharge the mortgage; and in our opinion the result of this contention will be not that the appeal but that the suit itself should be dismissed. When the plaintiff comes to Court and says his claim has been satisfied we have no alternative but to dismiss his suit. That is what had happened here, and the only course open to us is to allow the appeal and dismiss the suit. We must here observe that the plaintiff states that he has entered into some arrangements with the defendants 3 and 9 and does not desire to have in this suit any relief against them.

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Venkatasubba Rao, J.

In the circumstances, however, we make no order as to costs, but as the 1st defendant has filed the appeal in *forma pauperis* we direct that the Court-fees payable to the Government shall be paid by the plaintiff and the 1st defendant in equal moieties. The reason for making both the parties bear equally the said Court-fees is this. We cannot now assume that the allegations made by the defendant in her written statement are true and that the suit at its very inception was bad nor can we assume that the plaintiff purchased the interest of the 1st defendant in the suit properties with a view to stifle her defence. Though we are allowing the appeal, we cannot, in the circumstances, adjudge the plaintiff liable for the entire amount of the Court-fees payable to the Government.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Velu Thevan (dead) and another... *Appellants** (*9th Defendant—Judgment-debtor and his Legal Representative*)

v.

Krishnasami Reddi and others ... *Respondents* (*Plaintiff—Decree-holder and his Legal Representatives*).

Velu Thevan v. Krishnasami Reddi.

Civil Procedure Code, S. 47—Agreement prior to decree—Realisation of debt to be from another debtor—Plea in execution—If can be allowed.

An agreement prior to decree not to execute the decree that may be passed against one of the judgment-debtors but to realise the whole amount from the other debtor can be pleaded as a defence when execution is sought against him and should be considered by the executing Court on its merits. I L R 40 Mad. 233 (F B); 37 M L J 356; 46 M L J 240 followed; 43 Mad. 725; 14 L W 317 not followed.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 49 of 1922 preferred against the order of the Court of the District Munsif of Periyakulam dated 29th April, 1922 in E. P. No. 156 of 1922 in O. S. No. 448 of 1913.

K. V. Sesha Aiyangar for appellants.

C. Veeraraghava Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The 9th defendant, the judgment-debtor, is the appellant. A decree was passed on the 11th of

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*A. A. A. O. No. 39 of 1923. 22nd September, 1924.

Velu Thevan v. Krishnasami Reddi.

November, 1913, against defendants 1 and 9 and the family properties of defendants 2 to 5, 10 and 12 for Rs. 1,453-12-0, subsequent interest and costs. Various ineffective applications were made to execute the decree. E. P. No. 156 of 1922 was filed for attachment and sale of the 9th defendant's properties. When the properties were attached he filed a petition objecting to the execution of the decree on the ground that the plaintiff undertook not to proceed against him and to exonerate him and executed an agreement to that effect on the 5th of November, 1913, namely before the date of the decree. The agreement relied upon by the appellant is in these terms : "* * * * *As I have taken a promissory note for Rs. 1,000 from you and from Narayanaswami Naicken, son of Thirumalai Naicken, of Sankarapuram and as I have paid the Rs. 1,000 to Narayanaswami Naicken only and as you have signed in the promissory note only as *joint* for Narayanaswami Naicken I shall recover the whole amount from Narayanaswami Naicken only. If instead of that I recover the amount from you I alone shall be responsible to you for the amount of (loss) sustained by you."

The Lower Courts without admitting the agreement in evidence held on the authority of *Arumugam Pillai* v. *Krishnaswami Naidu* (1) that such an agreement cannot be pleaded as a bar and allowed execution to proceed.

The question for consideration in this Civil Miscellaneous Second Appeal is whether the agreement relied upon by the appellant, made prior to the passing of the decree in the suit, can be pleaded as a defence to the execution of the decree. In *Chidambaram Chettiar* v. *Krishna Vathiyar* (2) it was held by a Full Bench of this Court that such an agreement can be pleaded in proceedings taken in execution of the decree. In the course of his judgment in that case the Officiating Chief Justice pointed out, " The powers of the Court executing a decree are laid down in S. 47 the terms of which are extremely wide," and stated, " By a long course of decisions in this Presidency it has been held that an agreement made before the passing of the decree by which the decree was not to be executed for a certain time is a matter to be enquired into and decided by the executing Court." The decision was based upon the "very comprehensive terms of S. 47 " and upon the prior deci-

1. (1920) I L R 43 M 725 : 39 M L J 222.
2. (1916) I L R 40 M 233 : 32 M L J 13 (F B).

Velu Thevan v. Krishnasami Reddi.

sions of this Court. In *Doraiswami Moopan* v. *Subbalakshmi Palayee Ammal* (3) this decision was accepted as stating the correct law by Sadasiva Aiyar and Napier, JJ., though they distinguished that particular case from the Full Bench decision. The learned Judges pointed out, " The agreement in question was, not to further prosecute the suit, that is, not to obtain a decree in the suit. The decision in *Chidambaram Chettiar* v. *Krishna Vathiyar* (2) does not apply as the agreement before decree in that case was to the effect that a decree was to be passed but the decree so obtained was not to be executed." It is to be noticed that the learned Judges do not in any way limit the scope of that decision. The Full Bench decision was followed in *Sambasiva Aiyar* v. *Thirumalai Ramanuja Thathachariar* (4) but it was not applied as in that case the adjustment pleaded though subsequent to the preliminary decree was prior to the final decree. It was urged by the learned Advocate-General in *Sambasiva Aiyar* v. *Thirumalai Ramanuja Thathachariar* (4) that the Full Bench ruling required reconsideration, or, at any rate, that it should be confined to the facts of the case before the Full Bench. With reference to this argument the learned Judges Ayling and Krishnan, JJ., made the following observations :—"* * * we are not justified in cutting down the effect of the Full Bench in the manner suggested. We think the Full Bench decided that any pre-decree agreement between parties to a suit by the terms of which the passing of the decree is not to be objected to but the execution is to be stayed in whole or in part either temporarily or for all time can be pleaded and given effect to in execution proceedings and O. 22, R. 1 is no bar to it. Though the arguments of the Advocate-General against the view of the Full Bench, and in favour of the Calcutta view to the contrary as stated in *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (5) and *Hassan Ali* v. *Gauzi Ali Mir* (6) are not without force, we consider we are bound by that ruling. It is eminently desirable that on a question of procedure there should be a certainty and finality." The Full Bench decision has been followed again in a very recent decision in *Arunachala Goundan* v. *Swaminatha Aiyar* (7). It is pointed out by the learned Judges, Spencer and Devadoss, JJ., that " The

2. (1916) I L R 40 M 233 : 32 M L J 13 (F B).
3. (1917) 8 L W 205.
4. (1918) 37 M L J 356.
5. (1902) I L R 29 C 810.
6. (1903) I L R 31 C 179.
7. (1923) 46 M L J 240.

Velu Thevan v. Krishnasami Reddi.

District Judge's refusal to allow the defendant to set up in these execution proceedings, any agreement prior to decree, and his direction to the appellant to seek his remedy in a separate suit cannot however be supported. S. 47 of the Code of Civil Procedure is wide enough to permit any valid objection to be taken by a judgment-debtor to the execution of a decree by the decree-holder or the decree-holder's legal representative;" and the learned Judges refer to the Full Bench decision. The decisions in *Arumugam Pillai* v. *Krishnaswami Naidu* (1) and in *Mallayya* v. *Chinna Kottayya* (8) no doubt try to limit the scope of the application of the Full Bench decision. But in the latest decision in *Arunachala Goundan* v. *Swaminatha Aiyar* (7) as has been already pointed by us the Full Bench decision is given full effect and the decision is based upon the very wide terms of S. 47 of the Code of Civil Procedure.

In our opinion the Full Bench decision applies to this case and the agreement relied upon by the judgment-debtor should be considered by the Lower Court on its merits. We therefore set aside the order appealed against and remand the case to the Lower Court for disposal according to law. The appellant will have his costs here and in the Lower Appellate Court.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Narra Sri Sailam, minor, by mother and guardian Venkamma ...*Appellant** (*3rd Defendant*)

v.

Koganti Bhushayya and others ... *Respondents* (*Plaintiff and defendants* 1 *and* 2).

Sri Sailam v. Bhushayya.

Evidence Act, S. 92—Mortgage of a number of properties—Sale of one of them by the mortgagor to a stranger—Agreement between mortgagee and purchaser to release the item purchased from mortgage security—Oral evidence of—Admissibility.

After mortgaging a number of properties to a person, the mortgagor sold one of them to a stranger. The mortgagee agreed with the stranger-purchaser to release that property from his mortgage security, but later on sued to enforce his security against all the properties mortgaged to him. The stranger purchaser pleaded the agreement in defence and gave oral evidence of the same. *Held,* the instrument sued on being only one between the mortgagor and the

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*S. A. No. 1616 of 1922. 31st October, 1924.

1. (1920) I L R 43 M 725 . 39 M L J 222.

7. (1923) 46 M L J 240. 8. (1921) 14 L W 317.

mortgagee, the purchaser of a portion only of the mortgaged properties is not under S. 92, Evidence Act, precluded from giving oral evidence of the agreement. I L R 27 Mad 368 referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in A. S. No. 46 of 1921, preferred against the decree of the Court of the Additional District Munsif of Gudivada in O. S. No. 422 of 1919 (O. S. No. 63 of 1919, Principal District Munsif's Court, Gudivada).

V. Ramadoss for appellant.

K. Ramanath Shenai and *K. Sanjeeva Kamath* for respondents.

The Court delivered the following

JUDGMENT :—This suit has been instituted by the plaintiff to enforce a mortgage executed by the 1st defendant. Subsequent to the date of the mortgage, the 1st defendant sold the second item of the properties mortgaged to Subbiah, the father of the 3rd defendant. The contest is now between the plaintiff and the 3rd defendant. The latter pleads that the plaintiff agreed to release the item purchased by Subbiah and to confine his mortgage right to the other properties mentioned in the deed of mortgage. The first question that has to be decided is, whether the plaintiff did agree to release the second item. The learned District Munsif found it somewhat difficult to decide this question on account of the fact that at least three conflicting versions were placed before him. It is not necessary for me to refer at any length to the evidence on this part of the case. The learned Munsif has found that the plaintiff did agree to release the property. The oral evidence was meagre in the extreme. But the probabilities strongly pointed to the fact that the agreement set up was true. The sale-deed in favour of Subbiah referred to the outstanding mortgage. There is a recital in the sale-deed that, out of the price, a sum of Rs. 600 was paid to the 1st defendant in order to enable him to pay it in part discharge of the mortgage in favour of the plaintiff. After the sale-deed was executed by the 1st defendant and attested by several witnesses, it was taken to the plaintiff who was living in a different village for the purpose of his attestation being obtained. The plaintiff attested the deed and received Rs. 300 in part payment of his mortgage. There is some dispute regarding the

balance of Rs. 300 out of the sum set apart, namely, Rs. 600, but that has no bearing on this part of the case, for, in any event, it is clear that some amount out of the consideration for the sale was received by the plaintiff towards the mortgage. Mainly relying on this and similar circumstances, the District Munsif found that the plaintiff agreed with Subbiah to release item 2 of the mortgaged properties. The Subordinate Judge concurred in this finding and in Second Appeal this finding must be treated as final.

The Lower Courts having found that there was an agreement as pleaded by the 3rd defendant, the further question that had to be decided was, who were the parties to this agreement ? It was assumed by the District Munsif as well as the Subordinate Judge that if the parties to the agreement were the plaintiff, the 1st defendant and Subbiah, oral evidence of that agreement would be inadmissible under S. 92 of the Evidence Act. Under that section, no evidence of any oral agreement between the parties to the original instrument or their representatives in interest is admissible for the purpose of contradicting, varying, adding to or subtracting from the terms of such instrument. Both the Lower Courts dealt with the case on the footing that all the three were parties to the agreement and that oral evidence could not be given of it. It is unnecessary to enquire whether if the subsequent oral agreement pleaded was between the plaintiff, the 1st defendant and Subbiah, evidence of it is or is not admissible. The Lower Courts failed to direct their attention properly to the point at issue. I have searched in vain for a finding on this point in the long judgment of the District Munsif. There is no distinct finding in his judgment at all. This is not disputed at the bar. The Munsif overlooked the fact that he did not give a finding and when discussing the law on the subject he assumed that he had found on this point against the 3rd defendant. In the absence of any criticism of the evidence or any discussion of the matters that had to be considered in relation to this issue, I cannot treat the judgment of the District Munsif as containing a finding upon this very material point, *viz.*, who the parties were to the subsequent oral agreement.

The learned Subordinate Judge made also a mistake, one which goes to the very root of the matter. Having said in his judgment that the District Munsif's view that there was an agreement was correct, he definitely put to himself the question

"who were the parties to the agreement"? The answer is somewhat obscure. The Judge seemed to think that the real parties to the agreement were the plaintiff and Subbiah, but that the 1st defendant was also present at the time of the agreement. The mere presence of the 1st defendant in the Judge's opinion made him a party to the agreement. If the Subordinate Judge held that as a fact, the 1st defendant was also a party to the agreement, whether his conclusion was correct or not, it would, at any rate, be intelligible. I would then not be justified in interfering with his finding. But the whole of this part of the Subordinate Judge's judgment is vitiated by a fundamental error. Whether the 1st defendant was a party to the agreement or not must be decided on the evidence. If he was not in fact a party, he could not be said by a fiction of law to be a party merely because he was present at the agreement or paid a sum of money to the plaintiff.

In this state of things, I was taken through the whole evidence myself. I have come to the conclusion that the only parties to the agreement were the plaintiff and Subbiah. The Subordinate Judge says that the 1st defendant in the witness box did not speak to the release of item 2. If, according to the 1st defendant, there was no such agreement, it follows that he could not be a party to it at all. But I find that the Judge omitted to notice that in cross-examination the 1st defendant referred to the agreement but it was not elicited from him whether or not he was a party to it. Then again, D. W. 4 referred in his evidence to the agreement by the plaintiff to release the property. No questions were put to this witness either to elicit further particulars. There are two circumstances which have an important bearing on this point. The Lower Court points out in its judgment that when final negotiations were proceeding the plaintiff and Subbiah retired into the interior of the house and had a private talk. It was only subsequent to this incident that the plaintiff attested the sale-deed. The District Munsif points out that Subbiah and the plaintiff were near relations and that it was Subbiah that was able to prevail upon the plaintiff to release the property. These two circumstances in the light of the evidence in the case make it highly probable that the agreement was between Subbiah and the plaintiff alone. It is not necessary to deal with this question in greater detail. It is conceded that the evidence is very meagre and on a very careful consideration I

Sri Sailam v. Bhushayya.

have come to the conclusion that the only parties to the agreement were Subbiah and the plaintiff.

The words " representatives in interest " in S. 92 were construed in *Goseti Subbarao* v. *Varigonda Narasimham* (1). Subramania Aiyar and Boddam, JJ., held that the section had no application if only some of the representatives were parties to the later oral agreement. To the instrument in question the parties were the plaintiff and the 1st defendant. Subbiah who purchased only a portion of the mortgaged property is not under S. 92 precluded from giving oral evidence of the agreement. The evidence, therefore, of the agreement set up was admissible and the judgment of the Lower Court is set aside and the appeal is allowed. The 3rd defendant will have his costs throughout from the plaintiff.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Bhallamudi Kama Sastri ... *Appellant** (*Plaintiff*)

v.

Thirumamidi Kannamma and others ... *Respondents* (*Defendants*).

Kama Sastri v. Kannamma.

Hindu Law—Widow—Alienation—Reversioner inducing vendee to purchase—Estoppel.

Where a reversioner to the estate of a Hindu widow takes part in its alienation to certain transferees for value, advises the transaction, approves of it and represents that he is willing to hold up all such rights as he has in favour of the vendees, he cannot subsequently impeach the transfer on the strength of a conveyance in his favour from the daughter of the last male owner.

Gur Narayan v. *Sheolal Singh,* 46 C 566 (P C) distinguished.

Appeal against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in A. S. No. 255 of 1921 (A. S. No. 224 of 1919 on the file of the District Court, Vizagapatam) preferred against the decree of the Court of the District Munsif of Razam in O. S. No. 44 of 1918.

Y. Suryanarayana for appellant.

G. Lakshmanna for respondents.

The Court delivered the following

JUDGMENT :—This suit is a speculative suit. Both the Lower Courts have dismissed it, and, after carefully hearing

*S A No. 441 of 1922. 5th November, 1924.

1. (1903) I L R 27 M 368 : 14 M L J 218.

Kama Sastri v. Kannamma.

the arguments of the learned vakil for the appellant, I am satisfied that the decision reached by the Lower Courts is correct.

One Vizanna died in 1888 leaving his widow Lingamma and two daughters, Kannamma and Sitamma. Sitamma predeceased her mother and we are not concerned with her. Lingamma died in January, 1914. During her lifetime, she made two sales and the present suit has been instituted questioning their validity. On the 8th of October 1890 Lingamma sold what is described as one and one-fourth *vrithi* (share) to one Garimilla Kurmayya (Ex. VI). The consideration for the sale is stated in the deed to be Rs. 500. The learned Subordinate Judge has held that the sale can be upheld only to the extent of Rs. 207-12-0, one of the three items of consideration mentioned in the conveyance. The second transaction impeached is that evidenced, dated 20th March, 1894, by Ex. VI-A. The widow sold another one-fourth *vrithi* and house-site to the father of defendants 2 and 3. The deed mentions that the consideration was Rs. 500, but the learned Subordinate Judge has held that no part of it was utilised for any purpose which would be binding on the estate. These are the two transactions questioned by the plaintiff.

On the death of Lingamma, Kannamma, her daughter, the first defendant in the suit, executed in favour of the plaintiff a sale deed dated the 10th May, 1914, conveying to him such rights as she possessed in the suit properties (Ex. A). The sale deed was taken obviously with a view to file a suit and recover the properties from the possession of the vendees or their representatives.

In order to understand the grounds on which the decision of the Subordinate Judge is based, a few further facts must be stated. Kurmayya, the vendee under Ex.VI died, and on the 1st May, 1907, his representatives sold the property covered by Ex. VI to defendants 2 and 3 (Ex. II). The learned Subordinate Judge has found that this transaction was brought about by the plaintiff. He attested the sale deed and he identified the executant before the Registrar. It is in evidence that he himself advised defendants 2 and 3 to purchase the property. The plaintiff was at the time the nearest reversioner barring the 1st defendant and by his conduct he induced defendants 2 and 3 to purchase the property and part with the price. There is not the

slightest doubt that he caused defendants 2 and 3 to believe that he approved of the sale and that such rights as he had, he was willing to give up. In these circumstances, the plaintiff would be clearly estopped from questioning the transaction. The learned vakil for the appellant has, however, argued that any representation that the plaintiff made was made in his character as a possible reversioner, that, in the present suit, he claims under the first defendant, and that he ought not to be held bound by an estoppel which would not attach to the first defendant. For this position, the learned vakil has relied upon *Gur Narayan* v. *Sheolal Singh* (1) but that very case shows that the argument is untenable on the facts as they exist here. At page 580 this passage occurs in the judgment: " In their Lordships' opinion there is no estoppel. Besides, it should be observed that Hanuman did not acquire the property as a contingent reversioner to Maha Sundar." In the present case, however, a perusal of Ex. A, the conveyance in favour of the plaintiff, shows clearly that the first defendant transferred to him her rights in the property on account of the fact that he happened to be the reversionary heir to the estate. The recital is very clear and admits of no doubt. I agree, therefore, with the learned Subordinate Judge that the plaintiff cannot impeach the sale of the properties covered by Ex. VI.

Next, I proceed to deal with the second alienation effected by the widow, that is, the sale evidenced by Ex. VI-A dated the 20th March, 1894 in favour of the father of defendants 2 and 3. The facts connected with this transaction are these : Lingamma received Rs. 500 from defendants 2 and 3 and deposited the amount with Kondayya, the husband of Sitamma, with a direction that the sum should be paid to the two daughters on their attaining majority. The first defendant, after she became an adult, received a moiety of this Rs. 500, that is, Rs. 250, with another sum of Rs. 250 representing interest, from this Kondayya. She at that time was aware that her mother had sold the property to the father of defendants 2 and 3 under Ex. VI-A. She was further aware that the amount had originally been deposited with Kondayya for the purpose of a moiety of it being paid over to her. The transaction of sale was voidable. The first defendant was the reversioner who was entitled to question the transaction. With

1. (1918) I L R 46 C 566 : 36 M L J 68 (P C).

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the knowledge of these facts, she received from Kondayya Rs. 500. By these acts the first defendant adopted and ratified the transaction. The plaintiff, who claims through the first defendant, has no higher right than the first defendant herself has. I agree, therefore, with the learned Subordinate Judge that the plaintiff is bound to fail in respect also of the items to which Ex. VI-A refers.

It has been faintly suggested that Ex. VI-A was executed by Lingamma only as guardian of her minor daughters, Kannamma and Sitamma, and that, as on the date of the transaction, the daughters had a mere expectancy, a mere hope, of succeeding, the transaction is void. As a matter of fact however the document was not executed by her only as guardian of her daughters. The recitals in the document make this perfectly clear. The document moreover was signed by Lingamma in her individual capacity and not as representing her daughters. The argument that Ex. VI-A is void therefore fails.

The judgment of the learned Subordinate Judge is correct. The Second Appeal fails and is dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Avugaddi Jogamma and others . . . *Appellants** (*Defendants*)

v.

Lalam Pothanna . . . *Respondent* (*Plaintiff.*)

Jogamma v. Pothanna.

Part-performance—Compromise of disputed claim—Transfer of a portion of disputed property—Unregistered transfer—Possession and enjoyment—Subsequent suit in ejectment.

The defendants laid a *bona fide* claim to a portion of the properties in the possession of the plaintiff on the ground that they had contributed by their labour to the acquisition and expansion of the property. In consideration of the defendants waiving their rights to the rest of the property, the plaintiff gave away the lands in dispute to first defendant under an unregistered deed of transfer and put him in possession. Ten years after that date plaintiff sued to eject the defendant ignoring the unregistered transfer. *Held,* that the plaintiff was estopped by the doctrine of part-performance from laying claim to the properties transferred by the unregistered deed to the defendant.

Second Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in A. S. No. 97 of 1921

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*S A No. 813 of 1922. 24th October, 1924.

Jogamma v. Pothanna.

(A. S. No. 44 of 1921 on the file of the District Court) preferred against the decree of the Court of the District Munsif of Yellamanchilli in O. S. No. 134 of 1919.

P. Somasundaram for appellants.

Y. Suryanarayana for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff sues for the recovery of certain lands from the possession of the defendant. The 1st defendant is the sister of the plaintiff. She gave her daughter in marriage to him. The plaintiff's daughter was married to the 3rd defendant, a son of the 1st defendant. The parties are thus very near relations. The immediate occasion for the suit was the death of the plaintiff's daughter that is the 3rd defendant's wife. The plaintiff lost his mother when he was just an infant. The 1st defendant who was his senior in age by over 20 years came over to her father's house and began to look after and bring up her brother, the plaintiff. Shortly after, the plaintiff lost his father ; and throughout the 1st defendant brought him up, and it would seem that he was practically regarded as her child. After the plaintiff grew up, he became the Village Munsif and was unable to manage his own lands. The sons of the 1st defendant cultivated the plaintiff's lands and generally had supervision over them. This state of things continued till the plaintiff who was then forty years of age executed on the 18th April 1910 in favour of the 1st defendant what is termed a 'puroni' or an agreement (Ex. I). By this the plaintiff gave away to the 1st defendant the suit lands and since the date of the document she has been in continuous and undisturbed possession. Misunderstandings having arisen, as pointed out, owing to the death of the 3rd defendant's wife, the plaintiff has sued to recover the lands. The question to be decided is can the defendant rely upon Ex. I and resist the plaintiff's suit ?

Ex. I is unregistered. Before dealing with the law on the subject, it is necessary to notice another circumstance. Till 1910 all the parties appear to have lived together. Shortly before the execution of Ex. I, the 1st defendant and her sons laid a claim to a portion of the property in the possession of the plaintiff on the ground that they had contributed by their labour to the acquisition and expansion of the property. In consideration of the defendants waiving their rights

to the rest of the property, the plaintiff gave away the lands in dispute to the 1st defendant and executed Ex. I. The facts as I have stated are found by the District Munsif ; but on this part of the case the Subordinate Judge has given no finding. Under S. 103 and O. 41, R. 24 of the Civil Procedure Code, I have considered the evidence of the record and satisfied myself that the District Munsif has come to the correct conclusion on the facts. What then is the position of affairs ? The 1st defendant and her sons advanced some claims to the property in the possession of the plaintiff. The plaintiff agreed, in consideration of the defendants giving up these claims, to transfer to the 1st defendant the lands now in dispute. There was thus a contract supported by consideration. So far as the other antecedent facts are concerned, namely, the looking after of the plaintiff by the 1st defendant, the cultivation of the plaintiff's lands by her sons, these and other similar facts to which I have referred, would not in law amount to consideration, as under S. 2 (*b*) of the Indian Contract Act it would be essential that any act done by the promisee should have been so done at the desire of the promisor. There is no proof that acts done by the 1st defendant or her children were done at the desire of the plaintiff, and accordingly so far as these facts are concerned they would not constitute a valid consideration for the contract. It is not necessary to further dwell on this matter as I have pointed out there was a contract supported by consideration.

Acting on Ex. I the 1st defendant took possession of the property and from 1910 to 1919 when the suit was filed she was in possession of the property and she still continues to remain in possession. What then would be the effect of the absence of a registered conveyance in favour of the 1st defendant ? *Mahomed Musa* v. *Aghore Kumar Ganguli* (1) is a direct authority on this point. Their Lordships of the Judicial Committee held that whatever defects of form there might have been in relation to the compromise agreement in question in that suit, were cured by the conduct of the parties in continually acting upon it. At page 6 their Lordships observed thus :—" For the points against opening up the transaction are manifold and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors in title from that date

1. (1914) L R 42 I A 1 : 28 M L J 548.

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to this. The suit was dropped, the division of shares of the property was made, and it may be said generally that from its date until the date of Khodajanessa's death in the year 1890, and, indeed, from that date until the present time the property has been managed upon the footing of that division." They observed again :—" In a suit," said Lord Selborne in *Maddison* v. *Alderson* (2), " founded on such part-performance the defendant is really ' charged ' upon the equities resulting from the acts done in execution of the contract and not upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow." This Court gave effect to this principle in *Vizagapatam Sugar Co.* v. *Muthurama Reddi* (3) ; the learned Judges referred to the fact of the purchaser under the contract of sale being in possession of the property as part-performance of the contract which would take it out of the operation of the Statute.

The point is concluded by authority and as a matter of fact the Lower Courts, especially the District Munsif, would have dismissed the suit but for the circumstance that the then prevailing view so far as this Court was concerned was different.

In the result the judgment of the learned Subordinate Judge is reversed and the Second Appeal is allowed and the suit is dismissed with costs throughout.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Kalyanji (now dead) and another ... *Appellants** (*Respondents* 2 *and* 3—*Plaintiffs* 2 *and* 3)

v.

Ram Deen Lala ... *Respondent* (*Petitioner*—*2nd defendant*).

Kalyanji v. Ram Deen Lala.

Criminal Procedure Code (as amended in 1923), Ss. 195 (3) and 476-B—Order by Judge of Small Cause Court, Madras, under S. 476—Complaint forwarded to Magistrate for inquiry—Appeal—Forum—Presidency Small Cause Courts Act, Ss. 37 and 38—Scope of—Decree if appealable—" Principal Court having ordinary original civil jurisdiction"—What is—If refers to Original Side of the High Court—Order of complaint—Contents of—Indian Penal Code,

*A A O No. 412 of 1923. 6th November, 1924.

2. (1883) L R 8 A C 467.

3. (1923) I L R 46 M 919 ; 45 M L J 528 (F B).

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S. 193—Offence under—Complaint—What must contain—Rules of interpretation—Headings—Reference to.

The Chief Judge of the Court of Small Causes, Madras, passed an order under S. 476, Criminal Procedure Code, directing that a complaint under Ss. 193 and 196, Indian Penal Code, be filed against certain plaintiffs in a suit before him. The latter preferred an appeal against that order to the Appellate Side of the High Court, and at the hearing, objection was taken that the appeal lay to the Bench of the Court of Small Causes or if the Appellate Tribunal was the High Court the appeal lay to the Original Side of the High Court.

Held, (1) the right conferred by S. 38 of the Presidency Small Cause Courts Act is not of the nature of an appeal, and the decrees of the Presidency Small Cause Courts are not appealable decrees. It follows that there is no Court to which appeals ordinarily lie from the appealable decrees of that Court. *In re, Shivlal Padma,* I L R 34 Bom 316 followed. Scope of Ss. 37 and 38 referred to; (2) as there is no Court to which appeals ordinarily lie in the case of such decrees, an appeal has to be put in "to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction" the Presidency Small Cause Court is situated. This is the High Court and the phrase is not to be confined to the Original Side of the High Court. For the purposes of S. 195 (3) the Original Side is not a different Court from the rest of the High Court. *Jamnadas* v. *Sabapathi Chetti,* I L R 36 M 138 followed. *Munuswami Mudaliar* v. *Rajarathnam Pillai* ,(1922) I L R 45 M 928 : 43 M L J 575 distinguished.

Before an order is passed under S. 476, Criminal Procedure Code, the Court must hold such an enquiry that its order, when sent to the Magistrate, will amount to a complaint under S. 200. For that purpose, the complaining Court must decide upon and name the witnesses to be examined by the Magistrate.

In the case of an offence under S. 193, Indian Penal Code, the complaint itself must state what was the false evidence given, without leaving it to the Magistrate to fish about and find it.

Per Madhavan Nair J. :—In construing a section, the heading of the chapter in which it occurs is not to be taken into consideration if the language of the section is clear.

Appeal against the order of the Chief Judge of the Court of Small Causes, Madras, in M. P. No. 358 of 1923 in Suit No. 4774 of 1922, dated 19th October, 1923.

S. T. Srinivasagopalachari for appellants.

The Crown Prosecutor, S. Rangaswami Aiyar and *M. Krishna Bharathi* for respondent.

The Court delivered the following

Wallace, J.

JUDGMENTS :—*Wallace, J.* :—This is an appeal against an order of the Chief Judge of the Court of Small Causes, Madras, under S. 476 of the Criminal Procedure Code, directing that a complaint under Ss. 193 and 196 of the Indian Penal Code be filed against the appellants. Mr. Menon

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for the Crown Prosecutor raised two preliminary objections, first, that the appellate tribunal in a case like the present is not the High Court but a Bench of the Court of Small Causes, and secondly, that if the appellate tribunal is the High Court, the appeal must be put in on the Original Side of the High Court.

As to the first objection, an appellate tribunal is, by force of Ss. 476-B and 195 (3) of the Criminal Procedure Code, the Court, if there is such a Court, to which appeals from the appealable decrees of the Court of Small Causes ordinarily lie. Mr. Menon relies on S. 38 of the Presidency Small Cause Courts Act, which states that in the case of a contested suit, either party has the right to apply for an order for a new trial or for altering, setting aside, or reversing the decree. S. 38 does not talk of an appeal, but the heading of the chapter is "New Trials and Appeals." The rules of procedure governing an application under S. 38 are contained in O. 41 of the Provincial Small Cause Court Rules headed "Application for a New Trial," and it is to be in Form No. 15 described as an "Application for a New Trial." O. 41 throughout speaks of an application, not of an appeal. We also understand that no stamp is levied on such applications. No doubt rules of procedure could not take away a right of appeal given by statute; but the rules are an indication that the High Court which framed them did not consider that the right conferred by S. 38 was a right of appeal. There is no direct authority of the Madras High Court on this point, unless the case in *Srinivasa Charlu* v. *Balaji Rao* (1) be taken as such; but, with due respect to the learned Judges who decided that case, I do not think that S. 37 settles the question whether there is or is not an appeal, since S. 37 itself on its own wording is subject to the other provisions of that chapter. It is not necessary, however, in the view I take, to press this point further. I agree with the judgment in *In re, Shivlal Padma* (2), a case directly in point, that S. 37 implies that decrees of the Presidency Small Cause Court are not ordinarily appealable. The Bench in that case held that that was a sufficient ground for holding that there was no Court to which in the language of S. 195 of the Code of Criminal Procedure as it then was, "appeals ordinarily lie." The amended S. 195 now uses the phrase, "The Court to which appeals

1. (1896) I L R 21 M 232. 2. (1909) I L R 34 B 316.

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ordinarily lie from the appealable decrees..........of such former Court," which would imply that, although ordinarily there is no appeal, yet, if there are decrees of the Court which are appealable,then an appeal against an order under S. 476-B will lie to the Court to which appeals from such appealable decrees ordinarily lie. So that the real question now is not whether there is any ordinary right of appeal from the decrees of the Presidency Small Cause Court, but whether any of these decrees passed by that Court are appealable decrees. This question has to be decided not under S. 37 of the Act but under S. 38, and I am constrained to hold that S. 38 does not give what is usually known as a right of appeal. Had this been meant, it would have been laid down in unambiguous languages such as S. 96 of the Civil Procedure Code employs, " an appeal shall lie." S. 38 also makes no provision for a higher Court, for example, a Bench of the Small Cause Court, to hear an appeal ; and does not talk, for example, as S. 96 of the Civil Procedure Code does, of the " Court authorised to hear appeals." An application under S. 38 is to the same Court which passed the decree, and, in so far as appears from the section, it may be even to the same Judge who passed the decree, and there is no statutory provision elsewhere constituting a Court of Appeal to hear such applications. I therefore hold that S. 38 does not imply that any decree of the Presidency Small Cause Court is an appealable decree. It follows that there is no Court to which appeals ordinarily lie from the appealable decrees of that Court.

The second preliminary objection then has to be met. Since there is no Court to which appeals ordinarily lie from appealable decrees of the Presidency Small Cause Court, an appeal has to be put in to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction the Presidency Small Cause Court is situated. Mr. Menon contends that this phrase can apply only to the Original Side of the High Court. Under the unamended Code, there was a clear authority, *Jamnadas* v. *Sabapathi Chetti* (3) that the Original Side of the High Court was not a different Court for purposes of this section from the rest of the High Court, and that the High Court generally was the principal Court of Original Jurisdiction. I cannot see that the alteration of language in the section displaces this

3. (1911) I L R 36 M 138 : 21 M L J 1074.

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ruling. The High Court generally is still the principal Court having Ordinary Original Civil Jurisdiction. Mr. Menon, however, calls our attention to a ruling in *Munuswami Mudaliar* v. *Rajarathnam Pillai* (4) in which it was held that an appeal from an order under S. 195 by a Judge sitting on the Original Side of the High Court lies to a Bench of the High Court and argues from that and from the language of S. 195 (3) that, therefore, these two tribunals must be different Courts. I do not think that that follows. *Munuswami Mudaliar* v. *Rajarathnam Pillai* (4) may be pressed so far as to say that under the first portion of S. 195 (3), when an order by the Original Side of the High Court is in question, the term " Court " may be taken to mean "Side of the High Court" ; but *Munuswami Mudaliar* v. *Rajarathnam Pillai* (4) has not reversed *Jamnadas* v. *Sabapathi Chetti* (3) nor under the second part of S. 195 (3) can the word "Court" be made to mean " Side of the High Court. " The difficulties that would follow in holding that the High Court is not one Court but is as many Courts as there are varieties of Original and Appellate Jurisdictions comprised in it are much greater than the difficulty of reconciling the language of S. 195 (3) with *Munuswami Mudaliar* v. *Rajarathnam Pillai* (4). I am not prepared to sustain either of these preliminary objections and they both fail.

On the merits we are concerned only with the third plaintiff, Vadivelu Mudaliar, since the second plaintiff is now dead. In the first place, the Lower Court has misconceived the scope of S. 476. It was for the Lower Court to hold such enquiry that its order, when sent to the Magistrate, will amount to a complaint under S. 200 of the Criminal Procedure Code. For that purpose, the complaining Court must decide upon and name the witnesses to be examined by the Magistrate, or the complaint is liable to be dismissed on the ground that there are no witnesses. The Lower Court, however, has apparently left it to the Magistrate to enquire for himself and find out who the witnesses may be. Again, so far as the complaint filed by the Lower Court goes, the offences alleged to have been committed by the third plaintiff are offences under Ss. 193 and 196 of the Indian Penal Code. S. 193 is giving false evidence, but the complaint, which we have gone through, does not state what was the false evidence given by

3. (1911) I L R 36 M 138 : 21 M L J 1074.

4. (1922) I L R 45 M 928 : 43 M L J 575 (F B).

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the third plaintiff. It is not for the Magistrate to fish about in order to find out what statements the Lower Court may have considered to be false. The complaint itself must make that clear. The complaint under S. 193 cannot therefore stand.

S. 196 is "using as genuine evidence known to be false." This is with reference to certain entries of a symbol for "and Company" found interpolated in the account-books of the firm of which the 3rd plaintiff is a partner, the books having been filed in the case, S. C. S. No. 4774 of 1922, by the 3rd plaintiff who was conducting it. The complaint or order of the Lower Court does not indicate why the Lower Court thought that the 3rd plaintiff knew the addition of this symbol to amount to a false entry. The 3rd plaintiff had merely put into Court his own firm's accounts, which contained, let us suppose, interpolations for the purpose of showing that the transactions were with Chandu Lala and Co., instead with Chandu Lala only. Even so, I find it difficult to bring the case within S. 196. The third plaintiff put forward the accounts of the firm as they were at the time he produced them. He did not write these accounts nor is it suggested that he wrote the interpolations. The Office Manager was 2nd plaintiff and the accounts are in Guzerati, which is not 3rd plaintiff's language. The Lower Court does not indicate that there was any evidence that the 3rd plaintiff knew that the interpolation was a false statement and relies merely on the fact that it was the 3rd plaintiff who produced the accounts into Court. I am clear that no conviction could stand under S. 196 on such meagre evidence.

I am therefore of opinion that the order of the Lower Court should be reversed *in toto* and would direct accordingly.

Madhavan Nair, J.

Madhavan Nair, J. :—I have had the advantage of reading the judgment of my learned brother with which I agree.

This is an appeal against an order passed by the Chief Judge of the Court of Small Causes, Madras, under S. 476 of the Code of Criminal Procedure, by which he forwarded a complaint to the Chief Presidency Magistrate for holding an enquiry as to whether the two appellants are guilty of offences under Ss. 193 and 196 of the Indian Penal Code. The sanction was applied for under S. 195 of the Criminal Procedure Code but the matter was dealt with by the Chief Judge under S. 476 of the new Code.

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The two appellants along with another as partners of a firm instituted S. C. No. 4774 of 1922 before the Court of Small Causes against the respondent as 2nd defendant and another as 1st defendant for the recovery of the balance of money due for principal and interest for the price of goods sold by them to the defendants. The sanction applied for related to certain entries in the account books of the plaintiffs' firm which were adduced in evidence on plaintiffs' behalf in the said suit and marked as Exs. B-3 to B-5 and C to C-8. Those entries were relied upon by the plaintiffs in support of their case that they dealt with a firm styled T. Chandu Lala and Co., of which both the defendants were partners. The 1st defendant remained *ex parte*. The respondent pleaded that he was not a partner and that there was no firm with the name T. Chandu Lala and Co., and that the 1st defendant carried on business as T. Chandu Lala only without the addition of the words "and Co." The learned Judge held that the 2nd defendant was not a partner, that the plaintiffs' accounts were suspicious and that the word "ku" in Guzerati was probably interpolated subsequently in the plaintiffs' accounts for the purpose of supporting the plaintiffs' case. On these facts, the learned Judge came to the conclusion that a *prima facie* case under Ss. 193 and 196, Indian Penal Code, was made out against the appellants and therefore forwarded a complaint to the Chief Presidency Magistrate under S. 476, Criminal Procedure Code.

As the 1st appellant is dead, we have to deal with the appeal only so far as it concerns the 2nd appellant Vadivelu Mudaliar who was the 3rd plaintiff in S. C. No. 4774 of 1922. On the merits I have no doubt that the order of the Lower Court should be set aside. Proceedings are directed against this appellant as already mentioned under Ss. 193 and 196, Indian Penal Code. The complaint which we have perused does not state what the false evidence given by the plaintiff and the Magistrate is left to find this out for himself. Nor does the complaint give any list of witnesses in support of the prosecution case. As the complaint does not disclose the nature of the false evidence given by the appellant, I do not think it can be said that a *prima facie* case under S.193, Indian Penal Code, has been made out against him. As regards the complaint under S. 196, the evidence is not sufficient to convict the appellant for that offence. It is not proved that the appellant wrote the accounts or that he made the interpolation. This interpolation is in the Guzerati language and the appellant does

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not know that language. The learned Judge does not refer to any evidence to show that the appellant knew that this interpolation amounted to a false entry in the account-books. He is said to have produced the account-books in Court. Under these circumstances, it cannot be said that a *prima facie* case under S. 196, Indian Penal Code, has been made out against the appellant.

The main argument of Mr. Govinda Menon who appeared for the Crown Prosecutor on behalf of the respondent is that reading Ss. 476-B and 195 (3) of the Criminal Procedure Code together, the appellant should have preferred his appeal (1) not to this Court but to the Full Bench of the Court of Small Causes under S. 38 of the Presidency Small Cause Courts Act, and (2) even if an appeal lay to this Court, he should have preferred it to the Original Side of the High Court and not to the Appellate Side. S. 38 of the Small Cause Courts Act runs as follows :—

"Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree of order in the suit (not being a decree passed under S. 522 of the Code of Criminal Procedure) order a new trial to be held or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings."

In my opinion, this section does not confer a right of appeal on a defeated litigant, it also does not imply that a decree of the Court of Small Causes is an appealable decree. It is true that the section appears in the chapter headed "New Trials and Appeals," but it is a rule of construction that headings are not to be taken into consideration if the language of the section is clear. The section itself does not speak of appeals. If it was intended to confer a right of appeal, I have no doubt that we should have found in the section itself appropriate language such as "an appeal will lie," as we find in the Civil Procedure Code, for instance, in S. 96. The right of appeal is given to a party to carry the case from a Lower Court to a higher tribunal for testing the correctness of the Lower Court's judgment. It cannot be said that the jurisdiction conferred by S. 38 is necessarily upon a Bench consisting of more than one Judge, for, according to the language of the section, the application under it is to be made to the same Court that passed the decree and it is not stated that the Court is to consist of more than one Judge. In this connection, the rules of the Small Cause Court governing the procedure under S. 38 may be usefully referred to. A

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proceeding under S. 38 of the Small Cause Courts Act is called an " application for new trial " (*see* O. 41 of the Rules) and is to be in Form No. 15, which is termed an "Application for New Trial. " The rules show that what is contemplated under S. 38 is not an appeal but only an application. We have been informed that no stamp-fee is levied on such application. I may also refer to S. 37 of the Small Cause Courts Act which shows that ordinarily a decree of a Presidency Small Cause Court is not appealable.

The question discussed in the above paragraph has not been considered in any decision of this Court, but most of the considerations pointed out are referred to in a decision in *In re, Shivlal Padma* (2) with which I agree. In that case it was held that where a sanction to prosecute has been granted by a Judge of the Presidency Small Cause Court at Bombay, a Full Court of that Court has no power to revoke the sanction. Though it is a decision under S. 195 of the old Code, the reasoning of the learned Judges in that case may be relied upon for holding that a Full Bench of the Small Cause Court is not the Court to which an appeal will lie in this case under S. 476-B read with S. 195 (3) of the Criminal Procedure Code.

The next point argued on behalf of the respondent is that if the High Court is the Appellate Court contemplated under S. 195 (3) in this case, then the appeal should have been preferred to the Original Side of the High Court and not to the Appellate Side. The decision in *Jamnadas* v. *Sabapathi Chetti* (3) is an authority against this argument. When a similar contention was put forward in connection with S. 195 (7*c*) of the old Code, it was pointed out by the learned Judges on that case that " the Original Side of the High Court is not a different Court from the Appellate Side and that the High Court is the principal Court of Original Jurisdiction though it exercises both Original and Appellate Jurisdiction. " This decision has not been overruled by the decision in *Munuswami Mudaliar* v. *Rajarathnam Pillai* (4) which held that an appeal from an order under S. 195 passed by a Judge sitting on the Original Side lies to a Bench of the High Court. I do not think it follows from this decision that the High

2. (1909) I L R 34 B 316.
3. (1911) I L R 36 M 138 : 21 M L J 1074.
4. (1922) I L R 45 M 928 : 43 M L J 575 (F B),

Kalyanji v. Ram Deen Lala.

Madhavan Nair, J.

Court is not one Court but is composed of as many Courts as there are Original and Appellate Jurisdiction in it.

I therefore overrule the contentions put forward on behalf of the respondent, and, as I have already decided that the order of the Lower Court cannot be supported on the merits, I allow this appeal and set aside the order passed by the Chief Judge.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Naduvil Madam Parameswara Bharatigal *alias* Azhakapra Swamiyar Avargal, Trustee of Naduvil Mutt and as such the Udama of Pudukode Devaswom ... *Petitioner** (*Party Appellant in S. A. No.* 1080 *of* 1922)

v.

T. P. S. Issoop Rowthan and others ... *Respondents* (*Respondents in S. A. No.* 1080 *of* 1922).

Parameswara Bharatigal v. Issoop Rowthan.

Religious Endowment—Mutt situate in the Cochin State—Devaswom in Malabar—Trusteeship of—Dependency on Mutt for purposes of succession—Dismissal of head of madam by Cochin Government under a State Regulation—Effect of—If causes vacancy in the trusteeship of devaswom—Usage—Proof of.

The *Pudukode devaswom* in British India is appurtenant to the *Naduvil Madam* situated at Trichur, Cochin State, in the sense that the succession to the former is dependent on that to the *Madam.* In 1922 the Cochin Government, acting under its Regulation 1 of 1081 (M. E.) dismissed the then head of *Naduvil Madam* and appointed another as the head. In proceedings pending in the British Indian Courts relating to the *Pudukode devaswom* and instituted by the then *Udama* the question was raised whether by the executive action of the Cochin Government, the new head of the *Naduvil Madam* had not *ipso facto* become the *Udama* of the *devaswom* also. The evidence let in to prove the usage was to the effect that in cases of vacancy by death, the same person succeeded to both the institutions. *Held,* in the absence of proof of a usage that loss of headship of the *Mutt* by a cause other than death involved a forfeiture of the headship of the *devaswom* also, the old *Udama* continued in office and was the proper person to continue the proceedings.

The questions whether the removal from secular headship involved removal from the spiritual headship also, and how far a British Indian Court could go into the validity of the order of the Cochin Government were left open.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to

*C M P No. 2153 of 1922. 18th September, 1924.

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direct that Naduvil Madam Parameswara Bharatigal *alias* Azhakapra Swamiyar Avargal, Trustee of Naduvil Mutt, and as such the Udama of Pudukode Devaswom, be brought on record as appellant in Second Appeal No. 1080 of 1922 preferred to the High Court against the decree of the District Court of South Malabar in Appeal Suits Nos. 1041 and 1059 of 1920 preferred against the decree of the Court of the District Munsif of Alatur in Original Suit No. 194 of 1917 and allowed to proceed with the said Second Appeal.

S. Srinivasa Aiyangar and *T. S. Anantaraman* for petitioner.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for respondents.

The Court (Odgers and Hughes, JJ.) made the following

ORDER :—The preliminary question in Second Appeal No. 1080 of 1922 is whether the applicant Parameswara Bharatigal *alias* Azhakapra Swamiyar is entitled to carry on the appeal under the provisions of O. 22, R. 10 (1). It is alleged that this Swami has displaced the former head, one Narayana Bharatigal *alias* Kappiyur Swamiyar, as head of the Naduvil Madam in Trichur, Cochin State. It is objected that even if this is so, it does not affect the latter's rights over the Pudukode Devaswom which is situated in British India. The question which is preliminary and must be tried is whether the Pudukode Devaswom in British India is appurtenant to and forms part of the institution of Naduvil Madam, Trichur, Cochin State, and whether the trusteeship of this Madam and the Pudukode Devaswom has devolved on Azhakapra Swamiyar. Evidence on this point will have to be taken.

It should be added that it was at one time alleged before us that Kappiyur Swamiyar was of unsound mind. This allegation has now been withdrawn and no question will arise as to this.

The District Judge of South Malabar is requested to hear and determine this point and submit his findings in two months.

Ten days will be allowed for objections to the finding after the return of the same is posted up in the notice board of the High Court.

In compliance with the above order the District Judge of South Malabar submitted the following

FINDING —This petition has been sent down by the High Court under its order dated 7th August, 1923, for a finding whether the Pudukode Devaswom

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in British India is appurtenant to and forms part of the institution of Naduvil Madam in Cochin State and whether the trusteeship of this Madam and the Pudukode Devaswom has devolved on Azhakapra Swamiyar. In his affidavit before the High Court in these proceedings, Azhakapra Swamiyar claims to be the head of the Naduvil Madam by virtue of his appointment by the Cochin Government after the dismissal of his predecessor Kappiyur Swamiyar under the Cochin Regulation I of 1081 or 1906. He also claims that the Pudukode Devaswom is appurtenant to Naduvil Mutt. In his counter-affidavit, Kappiyur Swamiyar claims that he owns this Naduvil Mutt, that the Pudukode Devaswom is not subordinate to the Naduvil Mutt, but is an independent institution, that he is in possession of the Pudukode Devaswom, that the Cochin Government has not deprived him of the headship of the Mutt and that he reserves his status as British subject. No issues were framed beyond those indicated by the High Court. The first question for consideration is whether the Pudukode Devaswom is appurtenant to the Naduvil Mutt or, as the counter-petitioner contends, an independent institution. A quantity of documents has been filed to show that the Devaswom has always been under the management of the head of the Naduvil Mutt. The plaint in this suit filed by Kappiyur Swamiyar is itself relevant. Therein he styles himself head of Naduvil Mutt and Udama of Pudukode Devaswom. Udama usually implies ownership and certainly does not admit the idea of independence. Rama Variar, petitioner's witness 1, holds lands under the Pudukode Devaswom and was ordered to take renewal not by the Devaswom, but by the manager of the Mutt, Ex. A. Receipts granted by the same person (Exs. B, C) bear the name of the Mutt head but they are in connection with the Devaswom property. Ex. D evidences receipt for money paid to the agent at the Mutt office. Ex. E series shows that the accounts of the Devaswoms were kept at the Mutt office. Exs. G, H, J are demises of Devaswom lands by Kappiyur Swamiyar. Ex. N is a power-of-attorney granted by Kappiyur Swamiyar to the present petitioner in which the Devaswom property is described as being in charge of the Mutt. Ex. Q is another plaint filed by Kappiyur in which he admits that the Devaswom property is under the Mutt. There are similar admissions by his predecessor-in-title referred to in the judgment, Ex. T. Subordinate Devaswoms are admitted in the *Malabar Gazette* notice, Ex. AA. Exs. KK-1 to 10 are also kanom demises granted by the head of the Mutt. Ex. 11 series are accounts kept for the Devaswom at the Mutt head office in which two serial numbers are given, one for the Devaswom and one for the Mutt. The temple accounts were kept separate from the Mutt accounts as evidenced by Exs. 14, 16, 18 and 19 series. Counter-petitioner's witness 1 stated that the Madathipathi of the Naduvil Mutt is the Urallan *ipso facto* of all the Devaswoms and likewise his successor. All the amounts received from the Devaswom are entered in the headquarter accounts. In the light of this evidence, it is impossible for the counter-petitioner to contend that the Devaswom is independent of the Mutt. No doubt it is treated as a separate endowment, and no one has ever suggested that its property or income is mixed indiscriminately with that of the Mutt. Nevertheless it is quite clear that the immemorial managers of the Devaswom have been the heads of the Mutt for the time being. I find that the Pudukode Devaswom in British India is appurtenant to Naduvil Mutt in Trichur in this sense that the head of the Naduvil Mutt has always acted as manager or trustee of the Devaswom. • •

It remains to decide on whom the headship of the Mutt has devolved. Kappiyur Swamiyar was found to have succeeded to the headship of the Mutt

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in High Court's order in C. M. P. Nos. 3842, 3862 and 3863 of 1915, Ex. 24. In 1906 the Cochin Government passed Regulation I of 1081 (Ex. U) empowering the Diwan to call upon the trustees of any institution—and under S. 4 (2) Madathipathis are included in the term trustee—to furnish accounts (S. 5) empowering him to fine any trustee who disobeys such order and ultimately to dismiss him (S. 7). Acting in pursuance of this regulation, the Diwan fined Kappiyur Swamiyar on 26th November, 1920, Ex. W, and finally dismissed him on 18th March, 1922, Ex. Y. In his review petition of 27th October, 1922, Ex. 57, Kappiyur Swamiyar admits his removal from the headship of the Mutt and the appointment of the petitioner in his stead and requests that the order may be revised. "In the interests of the Mutt the cancellation of the order of dismissal is urgently needed and the petitioner therefore humbly prays for its cancellation." In his further petition, dated 8th March, 1925, Ex. 58, he again admits that he is removed from the headship of the Mutt and that the petitioner has been appointed to its management with disastrous results to the working of the Mutt. The petition sets forth that the order of dismissal was passed under the misapprehension of the true facts, but I do not find that the right of the Cochin Government to dismiss the Swamiyar for good cause is disputed. It has been argued before me that the order under this regulation is an act of a foreign Government which need not be regarded by British Courts, and also that even if Kappiyur Swamiyar was legitimately dismissed from the headship of the Naduvil Mutt, none the less, he would still continue to be the trustee for such property under the control of the Mutt as happens to lie in British territory. The general principle is clearly enunciated in Dicey's *Conflict of Laws,* head III, page 23 :—"Any right which has been duly acquired under the law of any civilised country is recognised and in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognised by English Courts." No one disputes that the sovereign power exercised by the Government of Cochin includes the right to control religious bodies and when once this right is embodied in the form of a regulation, that regulation becomes part and parcel of the constitution of the institutions which it controls. Kappiyur Swamiyar was only head of the Naduvil Mutt because he succeeded to the headship in accordance with the constitution of that body. This point was very fully discussed in the previous proceedings, first in this and subsequently in the High Court, Ex. 24. Now that the order of the Cochin Government has been passed dismissing him he has lost the headship equally in accordance with the constitution of the body.

It was argued that even if the position of the parties had been thus determined in the Native State of Cochin, still that could not affect a claim to succeed to immoveable property in British India. I see no force in this argument, and the analogy of adoption which was pressed by the petitioner appears to me to be sound.

In *Venkatappayya* v. *Venkata Ranga Row* (1) the principal plaintiff sued for the recovery of real property in British India claiming to be the duly adopted son of the daughter of the last owner. The adoption was by virtue of an unregistered authority to adopt executed in a Native State which would have been invalid in British India, but none the less was held to render the adopted son capable of inheriting real property in British India.

1. (1919) I L R 43 M 288 : 38 M L J 149.

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The counter-petitioner relies strongly upon the ruling in *Goswami Shri Girdharji v. Madhowdas Premji* (2). The question which determined that suit was whether the trustee of a certain shrine who had been deported from the State of Odeypore had been removed from his office of trustee by a competent tribunal (page 614). It was held that the deportation in that case did not deprive the plaintiff of his trusteeship. But in the present suit where the counter-petitioner has been dismissed under a regulation expressly devised for the control of trustees, it cannot be held that there has been no competent tribunal. There is no necessity that the tribunal should be judicial, so that the petitioner would have to sue for a judicial declaration that the order passed under the regulation was valid, before he could cite the authority of that order in British India. So far as the British Courts are concerned the action of the Native State is tantamount to the action of a private party acting in accordance with the law of the locality. A private person legally adopts or a Diwan legally dismisses and appoints, and the British Courts admit the validity of such legal action. The right which has been duly acquired (to repeat Dicey) is recognised.

Accordingly I find that the trusteeship of the Madam and of Pudukode Devaswom has devolved on Azhakapra Swamiyar, the petitioner.

After the return of the above finding from the Lower Court, the Court made the following

Ramesam, J.

ORDER:—*Ramesam, J.*—In 1917, one Narayana Bharati *alias* Kappiyur Swamiyar filed a suit as Udama of the Pudukode Devaswom against certain Muhammadans for declaration and injunction in respect of a site. The matter went up on appeal before the District Court of South Malabar and was decided against the Devaswom. A Second Appeal had to be filed. On the ground that Narayana Bharati had ceased to be the head of the Devaswom and that he himself became its head, one Parameswara Bharati *alias* Azhakapra Swamiyar filed the Second Appeal. He was asked to state how his right accrued. He then filed Civil Miscellaneous Petition No. 2153 of 1922, dated 25th August, 1922, supported by an affidavit. In this affidavit it was alleged that the suit properties belonged to Pudukode Devaswom.

"The said Devaswom and all properties belonging thereto are appurtenant to and form part of the endowment of the Naduvil Madam situated at Trichur, Cochin State, and, as such, the head and trustee of the Naduvil Madam for the time being, is the Udama and manager of the Pudukode Devaswom." The Cochin Government, acting under Regulation I of 1081 (M. E.) dismissed Narayana Bharati by its proceedings, dated 9th March, 1922, from the office of the said Naduvil Madam and appointed by the same proceedings the petitioner as head and trustee of the said Madam. The affidavit also al-

2. (1893) I L R 17 B. 600.

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leged that the said Narayana Bharati had been of unsound mind for nearly one year ; but this ground has since been abandoned and need not be referred to again. A counter-affidavit and reply affidavits were filed and our brothers (Odgers and Hughes, JJ.) called for a finding on the questions raised by these affidavits which are stated thus : " Whether the Pudukode Devaswom in British India is appurtenant to and forms part of the institution of Naduvil Madam, Trichur, Cochin State, and whether the trusteeship of Madam and the Pudukode Devaswom has devolved on Azhakapra Swamiyar?" The District Judge, South Malabar, has sent up his findings, and objections have been filed by the respondent (Narayana Bharati).

The learned Judge in the course of the finding has said " Exhibit 11 series are accounts kept for the Devaswom at the Mutt head office in which two serial numbers are given, one for the Devaswom and one for the Mutt. The temple accounts were kept separate from the Mutt accounts as evidenced by Exhibits 14, 16, 18 19 series. . . . No doubt, it is treated as a separate endowment, and no one has ever suggested that its property or income is mixed indiscriminately with that of the Mutt." But he also said "In the light of this evidence, it is impossible for the counter-petitioner to contend that the Devaswom is independent of the Mutt." Finally he stated his finding thus : " I find that Pudukode Devaswom in British India is appurtenant to Naduvil Mutt in Trichur in *this sense* that the head of the Naduvil Mutt has always acted as manager or trustee of the Devaswom."

Mr. S. Srinivasa Aiyangar who appeared for Parameswara Bharati has admitted before us that the two are entirely independent institutions and the endowments are separate and the Pudukode Devaswom is appurtenant to the Naduvil Madam only in the sense that the succession to Pudukode Devaswom is dependant on that to the Madam and in no other. His language is " for purpose of succession only, Pudukode is dependent." This very fair admission of Mr. Srinivasa Aiyangar reduces the points for determination to only one, *viz.*, what are the rules regulating the headship of Pudukode Devaswom ? How is it vacated and how is a vacancy filled up ? Apart from such rules of succession, the Pudukode Devaswom is not appurtenant to the Naduvil Madam.

Pudukode Devaswom is a public temple in British territory. It is not a private institution. It does not belong to any private individual or to any other institution—not even the Naduvil Madam. This is clear after the admission mentioned above. The Naduvil Madam is a Mutt at Trichur, Cochin. Both institutions are governed by their respective usages and, apart from usage, the law governing such institutions in the respective territories. In the present case, we are not concerned *directly* with Naduvil Madam. But we have to determine the usage regulating the Pudukode Devaswom [*Gossami Sri Gridharji* v. *Romanlalji Gossami* (3)] and if, for the purpose of determining this question, we have to look to the rules or law regulating Naduvil Mutt, such rules or law will have to be adverted to only to that extent.

Now, let us turn to the history of the Pudukode Devaswom. We do not know when, by whom and subject to what regulations it was founded. So far as we know, its history begins in 1843. Exhibits I to V show that Arur Thirumumbil was the head of Naduvil Mutt and also manager of the Pudukode Devaswom. Exhibits VI to IX show that Vishnu Bharati *alias* Naduvath Swamiyar was the head of the Mutt and Devaswom in 1846. Exhibit KK shows that he was succeeded by Manjanpatta Swamiyar and Exhibit JJ shows that Hariswara was the Swami in 1880. Pakaravur Subramania Swamiyar managed both the institutions from 1883 to 1892. He was succeeded by Thaikat Swami whose regime covers the period of 1892—1895. Pakaravur Vishnu Bharati was head from 1895 to 1915. In his time there was an important litigation. His junior Swami sought to have him removed from the headship (Exhibit T). He was succeeded by the respondent (Kappiyur Narayana Bharati) in 1915. In 1916 there was litigation between Pallipat Rama Bharati and him (Exhibit 24). All these Swamiyars were heads both of the Naduvil Mutt and of the Pudukode Devaswom. As each Swami died, the senior of the Swamiyars initiated by him succeeded to the two offices. These are the facts from which any rule or rules (by way of usage) regarding the Devaswom have to be inferred.

One rule of succession that can be easily inferred is that, if the head of the Pudukode Devaswom dies and there is a vacancy, the head of the Naduvil Mutt will succeed to the

3. (1889) I L R 17 C 3 (P C).

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headship of the Devaswom also. By the very nature of the rule, the vacancy will be simultaneous in both the institutions and the same person succeeds to both. He first succeeds to the Naduvil Mutt and by reason of his position as head of the Mutt and the simultaneous vacancy in the *headship of the Pudukode Devaswom,* he succeeds to the latter also. So much is admitted by both parties. But this is not enough to solve the problem before us. In the case before us there is no vacancy by death. There is a vacancy in the case of the Mutt by dismissal by a foreign Government. Does this vacancy involve a simultaneous vacancy in the headship of the Devaswom ? Unless there is a vacancy, there is no need to look for a successor. The petitioner's contention is that the usage regulating the Devaswom not only involves that the successor in the headship of the Mutt (on the death of the prior incumbent causing a vacancy in respect of the headship of both the institutions) also succeeds to the headship of the Devaswom, but also that the loss of the headship of the Mutt by a cause other than death involves the divesting of the headship of the Devaswom. Once the divesting is found, the further succession can be easily ascertained. But what is the evidence for such usage as will involve the divesting of the headship of the Devaswom as a consequence of the dismissal from the headship of the Mutt. There is no such evidence nor can there be such. As I have already pointed out, the only history available to us is from 1843, *i. e.,* a period of eighty years. During this period, no such case has occurred. It is impossible to hold that the usage proved, *viz.,* one relating to succession on vacancy covers the case where there is no vacancy (strictly) and includes the proposition required by the petitioner that the loss of the headship of the Mutt involves a forfeiture of the headship of the Devaswom. The proposition or rule is penal in its nature and must be strictly proved. There is no such proof. On this ground we hold that the respondent (Narayana Bharati) has not lost the headship of the Devaswom as a result of the loss of the headship of this Mutt, and he is the proper person to continue the Second Appeal. In this view, the further questions debated by the learned vakils need not be considered.

One such question raised by Mr. Ramachandra Aiyar is that the removal from the secular headship does not necessarily involve the removal from the spiritual headship. The Cochin Government has removed his client only from the *management.*

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No human power can remove him from the spiritual headship. This may be so. But the further difficulty in the application of the argument is what is the kind of headship (spiritual or secular) that qualified the head of the Mutt for the headship of the Devaswom ? This itself depends on usage and we have no materials to answer the question properly. Again, while conceding that a distinction may exist between the management and spiritual headship (see *Arunachellam Chetty and others* v. *Venkatachalapathi Guruswamigal* (4) and *Nataraja Thambiran* v. *Kailasam Pillai* (5) in certain cases, it is doubtful whether, when the office is only one, we can split it up into two.

A second point raised by Mr. Ramachandra Aiyar is that we can go into the validity of the order of the Cochin Government in so far as it affects an institution in British territory and if we find it not justified, refuse to recognize it in so far as it is sought to be applied to the Pudukode Devaswom. This contention raises interesting questions of Private International Law and has been ably argued on both sides. But, in the view taken by us, it need not be pursued.

I agree with the order proposed by my learned brother regarding substitution.

Reilly J.

Reilly, J.—I agree that whatever may be the exact effect of the order of the Cochin Government on the position and rights of Narayana Bharati in the Naduvil Mutt, it has not been proved that according to the usage of the Pudukode Devaswom he has been divested of the office of trustee of that Devaswom. He must therefore be recognised as trustee of the Devaswom entitled to conduct litigation on its behalf. This petition must be dismissed with costs.

Respondent, Narayana Bharati, will be substituted for petitioner as appellant in Second Appeal No. 1080 of 1922.

T. S. V. *Petition dismissed.*

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4. (1919) I L R 43 M 253 : 37 M L J 460.
5. (1920) I L R 44 M 283 : 39 M L J 98.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

[On a difference of opinion between Spencer, *Officiating Chief Justice* and Reilly, J.]

Gam Mallu Dora *alias* Mallayya and others ... *Accused**

Gam Mallu Dora, *In re.*

Criminal Procedure Code Ss. 234, 235 *and* 239 (1)—*Joint trial of several accused—Waging war against the King—Continuing offence—"Same transaction"—Meaning of.*

Per Curiam :—The offence of waging war under S. 121, Indian Penal Code, is a continuing offence and a charge under that section is not illegal as contravening S. 234 of the Criminal Procedure Code, by reason of its mentioning more than three offences spread over a period of more than a year.

Six accused persons were jointly tried and convicted of the offence of waging war under S. 121, Indian Penal Code by burning Police Stations, committing dacoities armed with dangerous weapons and doing other acts. It was found that the sixth accused had joined the party of rebellion after the first two accused had left it, but that the rebellion was organised and continued under the headship of a particular person whom the accused followed at one stage or another. *Held* by *Spencer and Krishnan, JJ.,* (*Reilly, J.* dissenting) that the joint trial of all the accused for the offence of waging war was, in the circumstances of the case, quite legal.

Per Spencer, J. :—In the course of committing a continuing offence like waging war there may be many minor incidents which of themselves constitute distinct offences. The validity of the conviction under S. 121, Indian Penal Code, is not affected by the striking off of the convictions for other offences forming component parts of the offence of waging war.

When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not being the sole test of the unity of the transaction, S. 235, Criminal Procedure Code, authorises persons accused of doing those acts to be charged and tried at one trial for them all.

Emperor v. *Sherufalli,* I L R 27 B 135 : *Emperor* v. *Datto Hanmant Shahapurkar,* I L R 30 B 49 ; *Choragudi Venkatadri* v. *Emperor,* I L R 33 M 502 relied on.

Per Krishnan, J. :—The question of the legality of a joint trial really depends upon the accusation made and not upon the result of the trial ; provided, of course, that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. *Abdul Salim* v. *Emperor,* I L R 49 C 573 followed.

Trial referred by the Court of the Agency Additional Sessions Judge, Waltair, for confirmation of the sentence of death passed upon the said 1st accused in Case No. 10 of the Calendar for 1924.

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*R. T. No. 47 of 1924 and Cr. Appeals Nos. 297 and 337 of 1924. 23rd September, 1924.

Gam Mallu Dora, *In re.*

This case was heard by their Lordships Spencer, O. C. J., and Reilly, J., in the first instance.

P. Markandeyulu for accused.

The Public Prosecutor for the Crown.

The Court delivered the following

Spencer, Offg. C. J.

JUDGMENTS :—*The Officiating Chief Justice* :—The six appellants before us form the third batch of persons tried for complicity in the Vizagapatam-Godavari rebellion which broke out in August 1922. The Agency Additional Sessions Judge has convicted them all of offences punishable under Ss. 121, 121-A, 122, 143, 147 and 148, Indian Penal Code, and he has convicted only the first and third appellants of an offence under S. 397, and the rest of offences under S. 395, Indian Penal Code, and has sentenced the 1st accused to death and the other five to transportation for life.

The first thing to be considered is whether the charge is in order both as regards the unrepresented appellants, accused 2 to 6, and as regards the first appellant, although his vakil has not raised the defence that the conviction of his client is bad for misjoinder ; nor does it appear that misjoinder of charges was made the ground of any objection when the appeals of the batches already disposed of were heard. There are eight counts in the charge. Of the first two counts one consists of a charge for waging war and another of a charge for attempting to wage war, which all form parts of S. 121 by the definition in the Code. It was unnecessary to have two counts for the same offence seeing that the dates and places are the same. Then the third count is that the accused conspired to wage war—an offence under S. 121-A—and the fourth is that they collected arms and ammunition—an offence under S. 122. It was unnecessary to have these counts in the charge as there was clear evidence that these men did much more than merely conspire and make preparations for war. The fifth charge relates to the murder of egiht Police Officers. The accused have all been acquitted of this charge and it is unnecessary to consider it further. The sixth count that " you and others did loot the Police Stations abovementioned " —(of which there are eight) on dates not specified—and that you " did extract supplies of food and other articles by force or threats from the villagers of various villages " on dates not specified, is too vague. Each looting of a village or Police Station should have been treated as a separate offence if it was intended to try any or all of the accused for dacoity

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apart from waging war. The convictions of the 1st and 3rd accused under S. 397—dacoity armed with a dangerous weapon —and of accused 2, 4, 5 and 6 under S. 395 of dacoity, must be quashed, as the charges did not give them sufficient notice and particulars of what they had to meet : but the validity of the conviction under S. 121 is not affected by the striking off of the convictions for other offences forming component parts of the offence of waging war, and the accused cannot be said to have been prejudiced in their defence on the charge for waging war, as the acts of dacoity were all merely some of a series of incidents which went to make up the continuing offence of waging war within the meaning of S. 235 (3), Criminal Procedure Code.

The Judge has not passed separate sentences for each offence. The combined sentence of transportation for life imposed for the offence under S. 121 cannot be reduced in the case of those accused against whom there is evidence of participation in that crime, as that sentence is the minimum prescribed by law under S. 121.

It was decided by Oldfield and Ramesam, JJ., in one of the appeals arising out of the Malabar rebellion, R. T. No. 80 of 1922, that the waging of war (or " adhering to the King's enemies " as treason is sometimes described in England) is essentially a continuing offence, in which several incidents, which may in themselves be separate offences, may be comprised. I see no reason to think it is otherwise. Rebellion implies a state of being rather than the doing of any act, although for a conviction it is necessary to prove that some overt act was committed by the offender. Rebellions and wars continue until they are suppressed by capture or destruction of the rebel forces or by the rebels laying down their arms and making their submission as subjects to their Sovereign and receiving his pardon. What was held by the Privy Council in *Subrahmania Aiyar* v. *King-Emperor* (1) to vitiate a trial was the joinder of more than three offences of bribery and extortion extending over 2 1|2 years at one trial without separate charges for each offence as that was a direct contravention of Ss. 233 and 234, Criminal Procedure Code. When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not being the sole test

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of the unity of the transaction, S. 235 authorizes persons accused of doing those acts to be charged and tried at one trial for them all—vide *Emperor* v. *Sherufalli* (2), *Emperor* v. *Datto Hanmant Shahapurkar* (3), which lay down the principle that intervals of time between the commission of a series of acts do not necessarily import want of continuity when the aims of those jointly tried have throughout been directed to one and the same objective, and *Choragudi Venkatadri* v. *Emperor* (4). *Subrahmania Aiyar* v. *King-Emperor* (1) was not a case of misjoinder of persons. S. 239, Criminal Procedure Code, (as amended), cl. (*d*), authorizes the trial of more persons than one on one charge and at one trial if they are accused of different offences committed in the course of the same transaction. If an offence is a continuing one, I do not find any real difficulty in regarding it as a continuous transaction. In the course of committing a continuing offence like waging war there may be many minor incidents which of themselves constitute different offences. To take the example of another offence of a continuing nature, the offence of being a member of an unlawful assembly (S. 143, Indian Penal Code), the members of it may commit several acts which amount of themselves to separate offences, and while S. 149 provides that they are not responsible for offences committed by the general body before those individual persons join or after they leave the body, I have never heard it suggested that all the members cannot be tried at one trial for the main offence under S. 143 as well as for those other offences which have been committed by any member in pursuance of the common object during the time when they were present in the assembly. To take another instance of a continuing offence —culpable homicide by starving a child to death by persons legally bound to maintain it illegally omitting to feed it— the acts or rather omissions might extend over a long period with occasional interruptions during which food might be given, closed by the culminating event of the child's death, and yet the whole would be one transaction with a single objective. It would be absurd to charge the guardians for withholding food from the child only on the day of its death when the cause of death was continuous and systematic starving. In the present case the matter is simplified by the fact that the accused are charged not merely for committing several offences

1. (1901) I L R 25 M 61 : 11 M L J 233 (P C). 2. (1902) I L R 27 B 135.
3. (1905) I L R 30 B 49. 4. (1910) I L R 33 M 502 · 20 M L J 220.

in one transaction, but for the *same* offence, in which several other offences are combined, thus bringing the case within the scope of S. 235 (3). Accused 4 and 6, according to the evidence, only took part in the second campaign ; the first incident of which was the looting of Anantagiri village on 10th March, 1923, and the last the attack on Paderu Police Station on 22nd September, 1923. There is no evidence that accused 4 and 6 took part in the first campaign which lasted from August 1922 to November 1922. There was an interval between November 1922 and March 1923 during which no overt acts on the part of the rebels were reported. These two accused were only seen in the company of other rebels after the 1st May, 1923. The fifth accused was first seen by P. Ws. 61 and 62 at Chintalapoody on the 30th October, 1922, upon which occasion constables were captured by the gang and Government rations looted. As the rebel gang led by Srirama Raju did not cease their operations or make their submission during the period in which these accused are charged with committing acts of waging war, I do not think that it was illegal to charge and try them simultaneously for the same offence of waging war under S. 121, Indian Penal Code, with other members of the gang who were inspired by a common object of subverting the Government and destroying its forces, "offence" being defined in S. 4 (1) (*o*), Criminal Procedure Code, as an act made punishable by law, and, "act" being defined in S. 3 (2) of the General Clauses Act, as including a series of acts, so that an offence is really an act or series of acts made punishable by law. The charging of accused 1 and 2 with the attack on the Police Station at Paderu, which took place after these two accused had been arrested and kept in custody, and the charging of accused 4 to 6 with attacking Chintapalli and other Police Stations, which were looted before these men joined the rebel gang, were pieces of carelessness which should have been avoided; but I cannot hold that it vitiated their trial for waging war so long as there was evidence to prove that they took part in attacking other Police Stations and villages which were properly mentioned in the charges as acts of waging war. I think however that accused 4 and 5, who looted no Police Stations and fought in no engagements with the forces of the Crown, must have been prejudiced by not being informed in the charge what acts of theirs constituted waging war specifically, and what charges they had to meet, and I consider that the con-

viction of these two accused should be quashed and that they should be re-tried by the Additional Sessions Judge upon properly drawn up charges, having reference to the part they took in specified incidents within the dates mentioned in the charge under S. 121.

The accused were all acquitted on the 8th count in the charge of mischief by fire by burning the Government rest-house at Koyyur and the sheds at Gudem. It is unnecessary to say more about that offence.

As regards the sixth accused the earliest incident about which there is any evidence of his participation in the rebellion is the attack on Paderu Police Station on the 22nd of September, 1923, which occurred after the arrest of the first accused on the 18th September and the second accused on the 14th September. As the continuance of the offence of waging war does not depend on the presence of particular rebels in the rebel band and as there is evidence that the gang continued under the leadership of Srirama Raju even after some of his adherents were killed and captured, I do not find the charge and trial of this accused along with other participators in the offence under S. 121 to be illegal—*vide* S. 239, cls. (*a*) and (*d*). If the leader, Srirama Raju, who was present throughout both campaigns, had been on his trial along with these accused, could it be said that any of those who joined his following at a later stage of the rebellion could not be tried along with those who deserted him at an earlier stage, seeing that all were charged with having committed the same main offence of waging war under his leadership at one time or another? I think not. Then on what principle, it may be asked, does Srirama Raju's absence from the dock alter the position of those who are present? I do not understand cl. (*a*) of S. 239 as applying only to offences of a continuing nature. Supposing two murders were committed in the course of one transaction and that *A* took part in both but *B* in the first only, *A* and *B* could be tried jointly for the *same* offence, viz., murder, but the charge would contain two counts against *A* and only one against *B*.

As regards the merits of the conviction, there is overwhelming evidence against the first accused that he took part in the attacks on the Police Stations of Chintapalli, Krishnadevipeta, Rajavommangi, Addatigala, Chodavaram, Annavaram and Malkanagiri in the depositions of P. Ws. 6, 7, 9,

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11, 36, 13, 43, 44, 49, 53, 54, 56 71 86 and of other acts of violence which are spoken to by P. Ws. 90, 91, 39, 41, 40, 48, 117, 59, 60, 72, 64, 82, 96, 100 and 65 and other witnesses. His name is mentioned in Exs. S, XX, ZZ, GGG, UUU (2), TT (1), BBB (1), T (12), VVV, XXX, but not in Exs. T, VV (1), SS (2), CCC and AAA. Of these witnesses some speak to the same occasion but most of them to different occasions. The cumulative effect of this evidence is very great and leaves no room for doubt that the first accused committed the offence of waging war. P. Ws. 6, 7, 9, 36, 49, 56, 62, 63, 39 and others say that the first accused was a leader or *sirdar* under Srirama Raju and carried a gun, (some say a .303 rifle) and posted guards. P. Ws. 23 and 24 say that he was among those who fired at the Police at Onjeri ghat where a constable was killed. The schoolmaster of Gudem, P. W. 8, says that he was one of the leaders who persuaded people to join the rebels. There is not much evidence that he organised the rebellion but there is a large amount of evidence that he took a leading part in it including the cutting of P. W. 90's ear. In his appeal petition and his statement to the Lower Court he pleaded that he remained with Srirama Raju under compulsion and that guards were set to prevent him from running away. Several of the accused in this case have excused themselves on the plea that they were made to help the rebels. If all these pleas were true the band could not have held together for one day. As observed in the judgments disposing of the appeals of those previously convicted, the nature of the country made escape easy. It is impossible to believe that the leader of the rebellion had enough staunch followers to spare to guard those in his band who were unwilling to remain with him if so many wished to desert.

There can be no doubt of the guilt of the first accused. His conviction should in my opinion be confirmed and seeing that he was a ringleader among the rebels and probably was one of those who took life at Onjeri, if not at other places, the sentence of death imposed on him, I think, should also stand.

As regards accused 2, 3 and 6, we have been referred to the evidence connecting them with the offence which is tabulated at the end of the judgment. The 2nd accused was seen by P. W. 9 and another witness carrying an ammunition box but he was also seen by P. W. 11 patrolling with a gun and a sword; so it appears taht he was found competent and willing

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and so was promoted to a post of greater trust under the leader of the band. I find that there is ample evidence to convict all these accused of the offence of waging war. The sentence imposed on them is the minimum allowed by the Code. Their appeal should, in my opinion, be dismissed, but as my learned brother is of opinion that the conviction of accused 1, 2, 3, 4, 5 and 6 is bad, the case will be laid before a third Judge under S. 429, Criminal Procedure Code.

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Reilly, J.—With great respect I find myself unable to agree with my Lord in this matter. I regret this extremely, not only because I recognize that my Lord's opinion is likely to be of much more value than my own, but also because, if my view is adopted, it will involve throwing away the time and labour spent on this case in the Sessions Court for reasons not directly connected with the guilt or innocence of the accused.

Eight charges were framed against the six accused who are the appellants before us. On two of these charges all of them were acquitted. On the remaining six charges all of them were convicted, on Charge 6 accused 1 and 3 being convicted of using deadly weapons in dacoity, punishable under S. 397, Indian Penal Code, and the rest being convicted of dacoity punishable under S. 395, Indian Penal Code.

Charge 1 is that all the six accused waged war against the King-Emperor, an offence punishable under S. 121, Indian Penal Code. Seventeen separate incidents, said to have occurred within dates more than 15 months apart, are mentioned in the charge, and at first sight it might appear that the Sessions Judge intended to charge the accused with that number of successive offences of waging war, which would offend against the rule that no one can be tried at one trial for more than three separate offences of the same kind nor even for three such offences if not committed within a year. But it was decided in Referred Trial 80 of 1922 that the offence of waging war, punishable under S. 121, Indian Penal Code, is a continuing offence, and I am content to follow that decision. I agree that Charge 1 is not illegal by reason of contravening S. 234, Code of Criminal Procedure, by mentioning more than three offences spread over a period longer than a year.

But in my opinion there are other fatal defects in Charge 1. The charge is to the effect that all the six accused between 22nd August, 1922 and 18th December, 1923 attacked and looted and attempted to loot eight specified Police Stations and attacked the forces of the Crown at nine specified places and

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did thereby wage war against the King-Emperor, committing offences punishable under S. 121, Indian Penal Code. No date is given for any of the 17 incidents mentioned. It is clear from the wording of the charge that the waging of war with which the accused are charged is in respect of the 17 incidents specified. Mr. Adam urges that, as waging war is a continuing offence, it would have been quite legal to charge the accused with waging war within certain dates and in a certain area without mentioning any particular incident. That may be so. But in this case particular incidents have been specified, and the accused have been informed by the charge that it is the accusation that they took part in those incidents which they have to meet. The incidents have not been mentioned in the charge as instances of their waging war or as illustrations of the way they did it : it is alleged against them that they took part in those incidents and thereby waged war. The prosecution have therefore to prove that the accused took part in those particular incidents or in some of them. If they fail to prove against any particular accused that he took part in any of those incidents, that accused must be acquitted on this charge. Evidence that he took part in other incidents of the rebellion might be used to corroborate evidence that he took part in these incidents or some of them but by itself cannot prove him guilty on the charge as framed. No evidence has been produced that accused 4 or accused 5 had anything to do with any of the 17 incidents mentioned in this charge. In my opinion accused 4 and 5 must therefore be acquitted on this charge. It may be possible to try them again for waging war by taking part in other incidents of which evidence has been given but which are not included in this charge ; but with that we are not now concerned.

A less simple question is whether it was legal to try accused 6 with accused 1, 2 and 3 on Charge 1. The evidence against accused 1 on this charge is that he took part in attacks on 6 Police Stations, the earliest being the attack on the Chintapalli Station on 22nd August, 1922 and the latest that on the Malkanagiri Station on the 11th June, 1923, and that he also took part in the attacks on the forces of the Crown at Onjeri and Damanapalli on 3rd September 1922 and 24th September, 1922, respectively. The evidence against accused 2 is that he took part in the attacks on 2 Police Stations on 23rd August 1922 and 19th October, 1922 respectively and in the 2 attacks on the forces of the Crown at Onjeri and Damanapalli in

September, 1922. The evidence against accused 3 is that he took part in the attacks on 3 Police Stations between 23rd August, 1922 and 11th June, 1923 and in the attacks at Onjeri and Damanapalli in September, 1922. There is also evidence that accused 1 was arrested on 18th September, 1923 and accused 2 on 14th September, 1923. The earliest and only incident mentioned in Charge 1 in respect of which there is any evidence against accused 6 is the attack on Paderu Police Station on 22nd September, 1923. That attack was more than 3 months after the latest of the 17 incidents mentioned in the charge in which according to the evidence accused 1 or accused 3 took part and 11 months after the latest of the incidents in which accused 2 took part. It was also after the dates on which accused 1 and 2 had been arrested and had disappeared from the scene. The finding of the Sessions Judge is that accused 6 only joined the rebels about 29th August, 1923. One witness, P. W. 112, mentions that accused 6 was present when rice was extorted by some rebels at Bodatharampalem in April, 1923. But apparently neither the prosecution nor the Judge relies on that evidence. There is no suggestion that the prosecution at any stage had evidence, which failed for any reason, that accused 1, 2, 3 or 6 took part in any of the 17 incidents other than those I have mentioned in respect of them. We must take it that the prosecution case was that they took part only in those of the 17 incidents respectively. The question is could accused 6 be tried legally for waging war at Paderu on 22nd September, 1923 with accused 1 and 2, who by that date had been arrested and had disappeared from the scene, with accused 1 and 3, who were charged with committing other acts of war but none later than June, 1923, and with accused 2, who was charged with none later than October, 1922? I speak of accused 1 and 3 not being charged with any act later than June, 1923, and accused 2 with none later than October, 1922 because the mere inclusion in the charge framed by the Sessions Judge of allegations that accused 1, 2 and 3 took part in the attacks on Paderu and other Stations, etc., which the prosecution had no intention of proving and knew in respect of Paderu Station to be untrue so far as accused 1 and 2 are concerned, or of allegations that accused 6 took part in incidents earlier than the date when according to their case he joined the rebels cannot help the prosecution. If the prosecution has evidence and sets out to prove that *A, B* and *C* has each committed a

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separate murder, their joint trial cannot be made legal by framing a charge that all of them committed all 3 murders. The charge in a Sessions trial must be based on evidence given before the committing Magistrate. A misjoinder of persons cannot be escaped by deliberately making the charge wider than the evidence produced to support it in order to represent all the persons tried as accused of all the offences or incidents included, though there is no prospect nor intention of proving more than that each is guilty of some of them. It may be noticed in passing that apart from any legal defect in it Charge 1 has been framed with so little care that it includes one attack on a Police Station and 7 attacks on the forces of the Crown with which there is no evidence to connect any of the accused in this case. Remembering that waging war has been held to be a continuing offence, the utmost that Charge 1 can be taken legally and effectively to allege against accused 1, 2, 3 and 6 is that accused 1 waged war from 22nd August. 1922 to 11th June, 1923, that accused 2 waged war from 23rd August, 1922, to 19th October, 1922, accused 3 from 23rd August, 1922 to 11th June, 1923, and accused 6 only on 22nd September, 1923. When the dates are set out like that, it is certainly a very surprising charge.

I think it is clear—and I understand that to be also my Lord's view—that the trial of accused 6 on Charge 1 with accused 1, 2 and 3 can be legal only if the attack on the Police Station at Paderu on 22nd September, 1923 can be treated as part of the same transaction as that in which accused 1 and 3 were engaged in June, 1923 and earlier and accused 2 on and before 19th October 1922, the date of the attack on the Rampa Chodavaram Station, the last of the 17 incidents in which accused 2 is shown to have taken part—an incident which occurred 10 months before accused 6is shown to have joined the rebellion. These widely separated incidents can only be treated as parts of one transaction within the meaning of S. 239, Code of Criminal Procedure, if the whole insurrection can be treated as one transaction in that sense. Is that a fair or reasonable interpretation of the word "transaction" as used in that section? If that interpretation is to be adopted, then 10 rebels might be tried together for 10 separate acts committed by them respectively at separate times and places over a period of many years if only they were all committed in furtherance of the same rebellion. In my opinion "transaction" as used in S. 239, Code of Criminal

Procedure, must mean something less wide than that. It has been suggested that, if waging war is a continuing offence and that offence may continue for a long period, then, so long as it continues and however many incidents it embraces, it must be one transaction within the meaning of the section. I must admit that at first sight that argument attracted me. But, with respect, an examination of the section, I think, shows that it is unsound. The first class of persons whom the section allows to be charged and tried together are "persons accused of the same offence committed in the course of the same transaction." There is something rather curious about those words. What is the meaning there of the words "in the course of the same transaction?" The provision relates not to persons accused of the same kind of offence, but to persons accused of the same offence. Would it not have been enough to provide that persons accused of the same offence may be charged and tried together? What is the meaning of adding the qualification "committed in the course of the same transaction"? We cannot treat those words as meaningless or redundant—at least we are not at liberty to do so until we are satisfied that it is impossible to attach any significance to them. Now, if we apply this provision to non-continuing offences, that is, offences embracing only one incident, such as murder, we cannot reasonably speak of two persons being accused of the same murder committed in the course of the same transaction. If we do so, the words "committed in the course of the same transaction" are clearly redundant and add nothing to the meaning. But, if we apply the provision to a continuing offence, it is possible to give a meaning to those words. Applied to a continuing offence they will have a meaning if we read "committed in the course of the same transaction" as having a restrictive effect. A non-continuing offence is necessarily one transaction: a continuing offence may or may not be so: persons accused of the same continuing offence may be tried together so far as their offence is confined to one transaction. If the provision is interpreted in that way, it has an intelligible and practicable meaning. In my opinion it must be so interpreted. If that interpretation is correct, an offence cannot be treated as necessarily one transaction—merely because it is a continuing offence. On the contrary the section implies that a continuing offence may embrace more than one transaction, but, only so far as it is concerned with one tran-

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saction, can more persons than one be tried together for it. If we apply this to waging war, the section allows us to try several persons together for the same continuing offence of waging war within the limits of one transaction but not if the offence alleged covers more than one transaction. Under S. 239 (*d*) several persons may be charged and tried together when accused of different offences committed in the course of the same transaction ; but "transaction" there must have the same meaning as in S. 239 (*a*).

We must return to the question whether an insurrection including many different incidents and extending over a long period can be regarded as one transaction within the meaning of S. 239, Code of Criminal Procedure. I can find no reported case in which "transaction" has been given so wide a meaning. It can hardly be denied that in ordinary parlance no one would think of speaking of a long-continued insurrection as a transaction. Is there anything in the section or the connected sections or the Code to justify us in giving the word so extended a meaning ? The general rule is laid down in S. 233 of the Code—for every distinct offence there shall be a separate charge separately tried. The principle obviously is that the accused person shall have a simple allegation to meet and the Court a clear issue to try. But to the general rule certain exceptions are made. One person may be tried at one trial for three offences of the same kind committed within a year (S. 234) ; one person may be tried at one trial for several offences forming parts of the same transaction (S. 235) ; one person may be tried at one trial for several offences or for alternative offences if it is doubtful which of those offences the facts which can be proved will constitute (S. 236) ; and lastly more persons than one may be tried together at the same trial for the same offence committed in the course of the same transaction, for three offences of the same kind committed by them jointly within a year, for different offences committed in the course of the same transaction, etc. (S. 239). The object of introducing these exceptions to the general rule is to prevent unnecessary duplication of proceedings. On examination it will be seen that all these exceptions can be interpreted so as not to conflict with the general principle that the accused person should not be perplexed and the Court should not be confused by complicated or numerous or disconnected allegations. In interpreting these exceptions it

must never be forgotten that they are exceptions to the general rule and therefore to be interpreted with strictness and, so far as they affect the defence of accused persons, with the utmost strictness. To my mind it is entirely wrong to approach the interpretation of the word 'transaction' in S. 235 or 239 with the idea of ascertaining how far etymologically it will extend, how far the thread of continuity implied in it can be stretched, how far we can strain its meaning without an obvious breakdown. In *Choragudi Venkatadri* v. *Emperor*(4) Benson, J. remarked that the provisions of the Code regarding charges " are designed to simplify and define within reasonable limits the charges that may be tried at one and the same time and so avoid the embarrassment of the accused.....It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code instead of straining them to cover doubtful cases. " With those observations I respectfully agree. Can we consistently with the spirit of the Code stretch the ordinary meaning of the word 'transaction' so as to make it embrace all the incidents of a long continued rebellion spread over a wide area and extending over many months ? This case itself I think illustrates the mischief of such an interpretation. At the trial accused 6, an ignorant hillman, had to stand in the dock for more than a fortnight and listen to the examination of 96 witnesses before a word of evidence was given against him. Is it unlikely that at the end of that time he was bewildered and befogged about the case ? It is clear that the Sessions Judge himself was confused by the complexity of the proceedings, as he fell into the remarkable error of convicting accused 4 and accused 5 on Charge 1, though there is no evidence at all that they had anything to do with any of the incidents included in that charge. I am now concerned, however, not directly with any prejudice which the form of the charge may have caused to the accused, but with its legality. In my opinion, the word " transaction " in Ss. 235 and 239 of the Code must not be interpreted in any special or artificial or conventional or technical way but as it is ordinarily used by men of education and common-sense. If you cannot speak of a series of events as a transaction in the ordinary sense in which that word is used, you cannot try a number of persons together in respect of those events by attributing a special and unusual meaning to the word in S. 239 of the Code. Can we in any ordi-

4. (1910) I L R 33 M 502 : 20 M L J 220.

nary sense of the word say that accused 2, when he attacked the Rampa Chodavaram Police Station in October 1922, was engaged in the same transaction as accused 6 when he attacked the Paderu Police Station in September of the following year? To my mind it is impossible to do so. If that view is correct, the joint trial of accused 2 and accused 6 was illegal and void. Similarly the trial of accused 1 and accused 3 with accused 6 was illegal. There are somewhat similar difficulties about the trial of accused 1, 2 and 3 together; but it is unnecessary to discuss them. If the trial of accused 1, 2 and 3 with accused 6 was illegal, we cannot exclude accused 6 from consideration and leave the trial of accused 1, 2 and 3 to stand good.

In my opinion the convictions of accused 1, 2, 3 and 6 on Charge 1 of waging war must be set aside and an order should be made for them to be retried for that offence either separately or, so far as there is evidence that they or any of them were jointly concerned in incidents of waging war which were parts of one transaction, together.

Of the other charges on which the appellants have been convicted Charge 2 falls with Charge 1. Charges 3, 4, 6 and 7 without any specification of times and places are too vague to stand. In my opinion the convictions of all the accused on Charges 2, 3, 4, 6 and 7 should be set aside and they should be acquitted on those charges as it does not appear to be necessary to try them again for those offences.

The case was referred to Krishnan, J. under S. 429, Criminal Procedure Code.

P. Markandeyalu for accused.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT :—This case has been referred to me under S. 429, Criminal Procedure Code, because of a difference of opinion between the learned Judges who heard the Appeals in the first instance. The learned Officiating Chief Justice was of opinion that the convictions and sentences of accused 1, 2, 3, and 6 should be confirmed and that the case against accused 4 and 5 should be re-tried; whereas my learned brother Reilly, J., who sat with him, was of opinion that the whole trial was vitiated as illegal and should be set aside; he directed that the 4th and 5th accused should be acquitted, and that accused 1, 2, 3 and 6 should be re-tried separately.

Both the learned Judges were agreed about certain minor charges framed against the accused. The main point on which they differed is on the question of the legality of the joint trial of all the accused chiefly on the first count in the charge. Under that count the accused were charged with the offence of waging war against the King-Emperor under S. 121, Indian Penal Code. The charge says, "That you, the above accused (naming all six of them) did with others, at eight places (named) attack and loot or attempt to loot the Police Stations there and did at other places (named) attack the forces of the Crown and did thereby wage war against the King-Emperor." The learned vakil for the 1st appellant (1st accused) urges that as it has been shown by the evidence in the case that the 6th accused joined the party waging war only long after the 1st and 2nd accused had ceased to be members of that party as they had already been arrested, the trial of the 6th accused with the 1st and 2nd accused and others jointly was not justifiable by anything in the Criminal Procedure Code. This argument was rejected by the Officiating Chief Justice but has been accepted by my learned brother Reilly, J.

No doubt, as Reilly, J. points out, the fundamental rule under the Criminal Procedure Code is what is stated in S. 233 that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately;" but the section itself mentions the exceptions to it and refers to Ss. 234, 235, 236 and 239. The learned Public Prosecutor contends that the joint trial of the six persons under S. 121, Indian Penal Code, is justified by S. 239 (*a*).

There can be no doubt that there was a war being waged in the Rampa district and this case has arisen with reference to that war; it was started by one Srirama Raju who was the ringleader of the rebels from August, 1922, when the first attack on the Chintalapudi Police Station was made and continued for a long time thereafter. The question I have to decide is whether the six persons who have been tried together under the first count are not persons accused of the same offence committed in the course of the same transaction within the meaning of S. 239 (*a*). There can be no doubt whatsoever that they are persons accused of the same offence because they were all charged under S. 121, Indian Penal Code, with

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waging the same war. Then the question is whether we can say that the offence was committed in the course of the same transaction so as to fall under S. 239 (*a*).

The question of the legality of a joint trial, in my opinion, really depends upon the accusation made and not upon the result of the trial; provided, of course, that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. It was so held in *Abdul Salim* v. *Emperor* (5) and I am prepared to follow it. It is not pretended here that there was any conscious attempt to join charges which could not otherwise be joined or that the charge as framed under count (1) was so framed for that purpose. The legality of the joint trial in this case has to be judged on the accusation and not on what was subsequently proved. The charge certainly as worded in count (1) puts all the six accused on the same footing as having committed all the various crimes mentioned in it in the course of the rebellion. The fact that it was afterwards shown that some two people among the six had by reason of their arrest ceased to be members of the party before a third man joined it, I do not think, will really affect the question at all.

The only question we have really to decide in the case is whether the various incidents mentioned in the charge were or were not parts of the same transaction. That the offence under S. 121 of waging war is a continuing offence has been laid down in this Court in R. T. No. 80 of 1922. It was followed by another Bench of this Court in Criminal Appeal No. 1891 of 1922 and I am prepared to follow that view. The waging of a war is clearly a continuing offence, it begins with the first act of war and goes on till the war is ended in some manner as pointed out by the learned Officiating Chief Justice. It may be, as Reilly, J. remarks, that the various incidents in a war may be so disconnected as to form different transactions. The question whether they form parts of the same transaction or must necessarily be held to be different transactions has to be judged in my view on the facts of each case.

In the present case there is no reason to suppose that the rebellion which was started by Srirama Raju and continuously carried on by him and his followers for a considerable time was anything but a single transaction. It was carried on throughout under his leadership and he and his followers were animated throughout with the same motive of overthrowing

5. (1921) I L R 49 C 573.

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the British Government. There was both continuity of action and unity of purpose regarding the various acts charged against the accused. No doubt several places were attacked and looted and more than one engagement was fought in which some deaths took place ; but I consider that we are justified in holding on the facts that the whole thing was one and the same transaction. The point was not taken in the Lower Court and has therefore not been fully threshed out. But I agree with the learned Officiating Chief Justice that the joint trial of the accused for the offence under S. 121, Indian Penal Code, is not illegal.

The expression " the same transaction " has been tried to be explained in several cases which have been brought to my notice. After all it cannot be said that any very satisfactory definition of the words has been given. Each case must be judged in my opinion on the facts of that particular case. Generally speaking I am prepared to follow the observations of the learned Judges in *Choragudi Venkatadri* v.*Emperor*(4) in which the effect of the previous decisions has also been considered as to the meaning of the expression. Abdur Rahim, J. says that the usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all ; but the main test, so far as I can see, is the unity of purpose. Continuity of action goes with unity of purpose. If the various acts are done in pursuance of a particular end in view and as accessory thereto, they may, as Abdur Rahim, J., observes, will be treated as parts of the same transaction. In this case there was clearly unity of purpose and continuity of action in starting and carrying on the war. All the accused were throughout acting with the same purpose of subverting the Government in joining the rebellion. In this connection it was urged that as there was a lull in the operations for three months, as stated by the learned Sessions Judge in para. 8 of his judgment, it broke up the war into two campaigns and there were therefore at least two transactions. I do not think the argument is right as in this case it cannot be said that at the time of the lull the rebels had abandoned their

4. (1910) I L R 33 M 502 at 507 : 20 M L J 220 at 226.

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idea of fighting against the Government. They were only waiting for a more favourable opportunity of attacking the Government forces. I am, therefore, of opinion that as a question of fact, various incidents mentioned in count (1) of the charge were parts of the same transaction and that the trial of these accused together was justified under S. 239 (*a*).

It was next contended that a single trial under the sixth count of the charge also rendered it illegal even if the trial under the first count was proper. It was urged by the learned vakil for the 1st appellant that the charge included more than three offences of the same kind committed in the course of a year as it charges the accused with eight separate dacoities ; and therefore the trial was bad as S. 234, Criminal Procedure Code, justifies only a joinder of three such charges at one trial. If there were eight separate and independent charges of dacoity against the six accused, no doubt the objection would be a strong one ; but the learned Public Prosecutor points out that these charges are not separate but are made for offences which had been committed in the course of one and the same transaction, namely, the waging of the war. That seems to be so as the various dacoities were only incidents in the course of the war ; if the count of waging war failed, count 6 also would fail. Count 6 begins by saying, "That you and others in your attacks on the Police Stations above mentioned did loot the stations of arms," etc.,the words above mentioned referring to the first count. I think it is not straining its language too much to hold that the charge meant to accuse six persons of dacoity as having been committed in the course of the war and therefore the joinder of more than three charges would be justified under S. 239 (*d*). It may be mentioned that the accused admitted that they did take part in the fituri rebellion and merely pleaded compulsion as their excuse. They were represented by a vakil, and no objection was taken to the frame of any of the charges or to the joint trial in the Lower Court. There is really no foundation for the suggestion that the accused were embarrassed or in any way prejudiced in their defence. They themselves never said so. However, if the trial was illegal, no doubt, the question of prejudice will not arise. I, however, agree with the learned Officiating Chief Justice for the reasons above given in holding that the conviction cannot be set aside on the ground that the trial was illegal.

On the merits the case of accused 1, 2, 3. and 6 has been hardly argued before me, for it is clearly proved against them

on the evidence. In fact, as I have stated already, it is not denied that these accused took part in the war. I confirm the conviction of accused 1, 2, 3 and 6 under S. 121, Indian Penal Code. As regards the sentence on the 1st accused, I shall deal with it presently. In the view I take it is unnecessary to consider their convictions under the other sections charged.

As regards the 4th and 5th accused, they are not shown to have looted any of the Police Stations mentioned in count (1) or committed any of the dacoities charged or to have fought in any engagement with the forces of the Crown. It is on this ground that Reilly, J. has directed their acquittal. It is, however, shown by the learned Public Prosecutor that there is a considerable body of evidence against them as set out by the learned Sessions Judge in the schedule to his judgment to show that they did take part in waging war though not exactly in the manner set out in count (1). In these circumstances, the proper order is, in my opinion, to quash the conviction of these two accused, because they would certainly have been prejudiced by the way in which the charge was framed under count (1), and to direct them to be re-tried by the Agency Additional Sessions Judge upon properly drawn up charges under S. 121, Indian Penal Code.

As regards the sentence on the 1st accused, I am not satisfied that a differentiation should be made between him and the other accused who took part in the rebellion who are before me. The learned Chief Justice confirms the sentence of death passed on him on the ground that he was probably one of those "who took life at Onjeri," but there does not seem to be clear evidence of it ; he was acquitted of the charge of murder of the police officers. I would, therefore, alter his sentence and impose upon him the same sentence as the other accused have received, *viz.*, transportation for life. With the alterations abovementioned, the appeals are dismissed.

A. V. V. *Appeals dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT:—LORD DUNEDIN, LORD ATKINSON, MR. AMEER ALI AND LORD SALVESEN.

Raja Maharaj Kumar Satya Niranjan Chakravarti and others ... *Appellants**

v.

Ram Lal Kaviraj and others ... *Respondents.*

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Kumar Satya Niranjan Chakravarti *v.* Ram Lal Kaviraj.

Minerals—Right to work—Putni lease—Lessee's right under—Lease giving right to minerals in express terms—Necessity—What amounts to—Transfer of Property Act, S. 108 (*o*)*—Meaning and effect of—Use of words "adha," "urdha" "Hadud Mahdud"—Effect—Right to minerals if and when includes right to work—Working of minerals by lessee not under lease but merely as trespasser—Lessor's suit for declaration that he is entitled to and is in possession of underground rights—Limitation—Limitation Act, Arts.* 120 *and* 144.

The plaintiffs were Zamindars, and the defendants were the putnidars and darputnidars of a Mauza which lay within the bounds of the plaintiffs' Zamindari. The suit which was raised in 1915 was for a declaration that the plaintiffs were entitled to and were in possession of the underground rights of the Mauza comprised in the putni settlement in favour of the defendants. The finding of the High Court, which was accepted by their Lordships, was that the defendants had worked the mines in the Mauza on a large scale from 1894 and to the knowledge of the plaintiffs from 1898.

Held, (1) on the construction of the putni lease, that there was every intention to convey all below the surface as well as all on it or above it;

(2) that the grantee of the minerals being also the grantee of the surface, and the question being one between the grantor and the grantee, the grant of the minerals included the right to work; and

(3) that assuming that the working of the minerals by the defendants was working not under a lease but by a mere trespasser, the suit, if possessory, was barred under Art. 144 of the Limitation Act as more than 12 years had elapsed since the possession became adverse, and if declaratory was barred under Art. 120 as more than 6 years had elapsed since the right to sue the declaration emerged.

Quaere : Whether cases holding, in the case of leases Mokurari and other tenures, that, in order to pass minerals to the lessee, express words must be used, apply equally to putni tenures.

Effect of use of such words as "adha," "urdha," "Hadud Mahdud."

S. 108 (*o*) of the Transfer of Property Act obviously deals with the ordinary rights of a lessee in an ordinary lease, but it would be nothing less than an absurdity to hold that its terms cut down the right to work a mineral field expressly conveyed.

Quaere : Whether a putni tenure, without more said, transfers all the rights of the Zamindari, including the right to the minerals.

*P C Appeal No. 64 of 1923, 25th November, 1924.

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Appeal from a decree of the High Court (16th June, 1920) which reversed a decree (23rd August, 1917) of the Subordinate Judge of Jamtara.

The plaintiffs, as Zamindars of the village of Sultanpur, filed their plaint on the 16th April, 1915, in the Court of the Subordinate Judge of Jamatara against the Putnidars and Darputnidars of the village, stating that the Settlement operations of the village under Regulation III of 1872 had been completed, and that, though the defendants had no right to the minerals in the village, they had in or about 1911 unlawfully cut and disposed of the coal subjacent to the lands held by them. The plaintiffs therefore claimed—(*a*) a declaration that they, and not the defendants, are entitled to and are in possession of the underground rights of the said village, (*b*) damages for the coal removed, and (*c*) an injunction restraining the defendants from working the mines in the future. The defendants pleaded *inter alia* that they held the lands under a Putni Settlement, dated 5th October, 1852, (a translation of which is set forth below in their Lordships' judgment) which granted to them and their predecessors all rights, including the minerals in the land, and that all that the plaintiffs were entitled to was the annual rent of Rs. 25 thereby reserved. They particularly referred to the following passage in the said putni lease in support of their contention :—

"*Adha urdha hadud mahdud hak hakuk sudamata jaha achha dakhalkariba zamindarihoite kharij hoite parbena*"

which, being translated, meant—

"And all rights and interests appertaining to all such things lying within the four boundaries and above and below (the surfaces). You will not be ousted from the Zamindari."

They also contended that the right to the minerals not having been expressly excepted from the said lease, was by implication conferred on the lessees ; and further that the suit was barred by limitation either under Art. 144 or under Art. 120 of the First Schedule to the Limitation Act (IX of 1908), as their working of the mines had begun as far back as the year 1894.

The Subordinate Judge (C. N. De, Esq.) on the 23rd August, 1917, made a decree in favour of the plaintiffs, which, on appeal, was reversed by the High Court of Judicature (Jwala Prasad and Adami, JJ.) on the 16th June, 1920, the Judges remarking as follows :—

"The Court Translator has translated the words "adha" and "urdha" as "above and below the surface." Surface includes all the land except the

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mine or the soil overlying the minerals. The word "mine" is used in various senses. It denotes underground excavation made for the purpose of getting minerals, and also stratum or vein or aggregation of strata or veins of minerals, whether open or unopen. "Sub-soil" includes all this. The word "adha" in the document is still more comprehensive. It means the nether world, the entire region from the surface down to the centre of the earth; it includes all the strata below the surface, including the mines and minerals. Thus the words "adha" and "urdha" in the document conveyed the underground rights to the defendants, including the right to work mines and extract coals. The corpus of the putni grant having been thus ascertained to include the surface and the underground rights, the words "hak hakuk" occurring after the words "adha urdha hadud mahdud" transferred all the rights underground to the putnidar defendants.

"No doubt the annual rent of Rs. 25 reserved in the putni lease in question is low, but this is explained by the fact that the parties did not know that the sub-soil contained valuable minerals, such as coal. But when all the rights in the sub-soil are expressly transferred by the terms of the deed, the fact that the rent was low, or that the parties did not know that there were valuable minerals under the soil, would not render the transfer invalid."

The plaintiffs appealed to His Majesty in Council.

W. H. Upjohn, K. C., A. M. Dunne, K. C. and *B. Dube* for appellants :—

The order of the Settlement Officer, made under Regulation III of 1872, records that the defendants possessed only the surface rights in the land, and the Civil Courts have no jurisdiction thereafter with the matter. Further, having regard to the language of S. 108 (*o*) of the Transfer of Property Act (IV of 1882) the defendants have acted in breach of their lease, and cannot profit by their own wrong. Alternatively, even if it be held that the terms of the lease gave the defendants the minerals in the land, it did not confer on them the right to dig or excavate the soil for obtaining the minerals underlying the land.

L. de Gruyther, K. C. and *K. Brown* for respondents.

25th November, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—The present action is as to the right to the minerals in a Mauza at Sultanpur. The plaintiffs are the Zamindars of a Zamindari within the bounds of which the said Mauza lies. The defendants are the putnidars and darputnidars of the said Mauza. The defendants are working, and, as the High Court have found—as to which finding no dispute has been raised before this Board—have worked the mines on a large scale since 1894 and to the knowledge of the plaintiffs since 1898.

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The present suit was raised in 1915. The defendants rely upon three separate defences. First, they say that being putnidars they are in right of all the Zamindari rights appertaining to the territory embraced in the putni lease unless exception has been expressed, and that no exception of minerals was expressed. Secondly, they say that the putni lease gives them the right to the minerals in express terms. Thirdly, they say that the suit is barred either under Art. 120 or Art. 144 of the Schedule to the Limitation Act. The learned Subordinate Judge decided all three questions against the defendants and gave decree. On appeal the High Court of Patna affirmed the view of the Subordinate Judge on the first question, but reversed him on the second. It is somewhat difficult to say whether they affirmed or reversed on the third, but, as they were in favour of the defendants on the second, they dismissed the suit.

On appeal to this Board all these questions have been argued at great length, and it has been urged that the first question is one of very general importance. Their Lordships, however, think that the case may be disposed of on the second and third questions. To take the third question first, the relief asked by the plaintiffs was at once possessory and declaratory, for they ask " that it should be declared that the plaintiffs are entitled to and are in possession of the underground rights of the said Mauza." Their Lordships think that they are placed in this dilemma. The suit is admittedly raised more than 12 years after the working of the minerals on a large scale, that is to say, a proper working of the field. It must be assumed for the purposes of this plea that the plaintiffs are right on the first and second points. The working by the defendants was, therefore, working not under a lease but by a mere trespasser. If, therefore, the suit is possessory, then it is barred under Art. 144 of Schedule I, for more than 12 years have elapsed since the possession became adverse. If, on the other hand, the suit is declaratory, it is barred under Art. 120, for more than 6 years have elapsed since the right to sue the declaration emerged. Further, their Lordships agree with the High Court on the second question. This depends on the document of title. It runs as follows :—

DEED OF PUTNI SETTLEMENT.

"We let out to you in Mofussali Putni settlement the Mauza Sultanpur, as per boundaries given in the Thakbasta papers, appertaining to Taraf Afzalpur and comprised in our Zamindari share, amounting to 4 annas in Tappa Kuntahit

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Karaya, excluding the Chakran Jaigir, Debottar, Brahmottar and other extra lands, etc., and the Katai Jungles included in Tikish (?) at an annual rental of Rs. 25 in Company's coin and a premium of Rs. 45 in Company's coin. You will hold possession of all the lands appertaining thereto from a very long time, such as Mal, Khamar, Hasil, Patit, Bill, Jhil, Khal, Kandar, Pahar and Parbat, Jalkar, Falkar, the fruit-bearing and non-fruit-bearing trees and the Jungles and all rights and interests appertaining to all such things lying within the four boundaries and above and below (the surfaces). You will not be ousted from the Zamindari."

There have been a series of cases before this Board in which their Lordships have held in the case of leases of Mokurari and other tenures, that, in order to pass minerals to the lessee, express words must be used. They are *Tituram Mukerji and others* v. *Cohen and others* (1); *Kumar Hari Narayan Singh Deo Bahadur and another* v. *Sriram Chakravarti and others* (2); *Raja Sri Sri Durga Prasad Singh* v. *Braja Nath Bose and others* (3); *Sashi Bhushan Misra and others* v. *Jyoti Prashad Singh Deo and others* (4); *Giridhari Singh* v. *Megh Lal Pandey and others* (5) and *Raghunath Roy Marwari and others* v. *Raja of Jheria and others* (6). Both the Subordinate Judge and the Judges of the High Court have decided that these cases equally apply to putni tenures. Without so deciding this must be assumed for the purpose of deciding the second question. The Subordinate Judge thought that such words as "adha," "urdha," "Hadud Mahdud" were mere words of style commonly used by writers of deeds without a proper understanding of their meaning, and, therefore, refused to give any effect to them. This seems a mistaken view. Common words of style used in conveyances of any sort may be, and often are, words of surplusage, but when they are not words of surplusage they must be given the proper effect of their own meaning. This view was taken by the High Court. They thought that, looking to the anxious expression of the generality of the grant as evidenced by the long category of things conveyed, the words "adha" and "urdha" made it plain that there was every intention to convey all below the surface as well as all on it or above it. With this view their Lordships agree.

Two more contentions of the appellants must, however, be stated in order to be set aside. Their counsel argued that S. 108 (o) of the Transfer of Property Act settled the

1. (1905) L R 32 I A 185. 2. (1910) L R 37 I A 136 : 20 M L J 519 (P C)
3. (1911) L R 39 I A 133. 5. (1917) L R 44 I A 246.
4. (1916) L R 44 I A 46 : 32 M L J 245 (P C).
6. (1919) L R 46 I A 158 : 36 M L J 660 (P C).

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question. Their Lordships consider this an impossible contention. The meaning of the section is clear enough. It is obviously dealing with the ordinary rights of a lessee in an ordinary lease, but it would be nothing less than an absurdity to hold that its terms cut down the right to work a mineral field expressly conveyed. Even if the words "with leave to work" were added, the words of the section, if taken literally and as of universal application, would prevail, because an Act of the Legislature must prevail against private paction. They further argued that a right to the minerals does not infer a right to work. It is a general principle of all grants *quando aliquid conceditur id etiam conceditur sine quo res ipsa non esse potest.* This is always true as between grantor and grantee, but it does not necessarily apply as against third parties. If the grantor has granted the surface to A and the minerals to B, it may well be that the mere grant of the minerals will not include a right to bring down or otherwise injure the surface in the process of winning the minerals. But here there is no question of that sort. The grantee of the minerals is also the grantee of the surface. Their Lordships have, therefore, no hesitation in saying that this grant of the minerals, in a question with the grantor, which is the only question here, includes the right to work. Such being their Lordships' views, which directly lead to an affirmance of the judgment of the High Court, they would, in ordinary circumstances, have said no more as to the first and general question of whether a putni tenure, without more said, transfers as has been contended by the respondents all the rights of the Zamindari, including the right to the minerals.

There is admittedly conflicting authority on the point, but the learned Subordinate Judge, and also the Judges of the High Court, considered that the authorities in favour of the Putnidar were overruled by the decisions of the Board in the series of cases mentioned above. Their Lordships cannot agree with that view. *Tituram Mukerji and others* v. *Cohen and others* (1) was the case of a maintenance grant. This was held not to include minerals. *Kumar Hari Narayan Singh Deo Bahadur and another* v. *Sriram Chakravarti and others* (2) was Debottar tenure. *Raja Sri Sri Durga Prasad Singh* v. *Braja Nath Bose and others* (3), was the case of

1. (1905) L R 32 I A 185.
2. (1910) L R 37 I A 136 : 20 M L J 519 (P C).
3. (1912) L R 39 I A 133.

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lease held as the appanage to the office of Digwar. *Sashi Bhushan Misra and others* v. *Jyoti Prashad Singh Deo and others* (4) was the case of a Brahmottar tenure, which means that that was a grant to Brahmins for their support. *Giridhari Singh* v. *Megh Lal Pandey and others* (5) was an ordinary Mokurari lease. *Raghunath Roy Marwari and others* v. *Raja of Jheria and others* (6) was again a case of Brahmottar tenure. Not one of these was the tenure of a putni taluk in the hands of a putnidar. In their opinion the question, so far as direct decision of this Board is concerned, is still open. It really turns on what is the true nature of a putni tenure. Their Lordships think that the learned Judges have been misled by a wrong view of expressions used by Lord Shaw in *Giridhari Singh* v. *Megh Lal Pandey and others* (5) when quoting the judgment of Lord Buckmaster. His Lordship says :—

> "The decisions establish that when a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

But that only means that the mere fact of a lease being permanent, transferable, and heritable does not necessarily carry with it the result that the lessee has all Zamindari rights. His Lordship was dealing with a contention founded on Mokurari leases. The passing of a Mokurari lease does not, says he, have the effect that all the rights of a Zamindar go with it, but his Lordship did not mean to say and did not say "because a permanent lease does not entail that effect, therefore, inasmuch as a putni lease is a permanent lease, it does not entail that effect." That question was not before him and was not decided. Their Lordships do not decide it now as it is not necessary for the judgment, nor do they wish to express any opinion on the matter save one, *viz.*: that they do not agree with the dictum of the High Court which says that the judgment of Prinsep and Hill, JJ., in the case of *Nawab Sir Ali Quader Syed Hossein Ally Mirza Bahadur* v. *Rai Jogendra Narain Roy* (7) has been overruled by the decisions of this Board above cited. That decision is in conflict with the decisions of other Courts in India, and whether it or those other decisions are right must remain for settlement on another occasion.

4. (1916) L R 44 I A 46 : 32 M L J 245 (P C). 5. (1917) L R 44 I A 246.
6. (1919) L R 46 I A 158 : 36 M L J 660 (P C). 7. (1889) 16 C L J 7.

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Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellants : *H. S. L. Polak.*

Solicitors for respondents 1 to 10 : *Pugh and Co.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SUMNER, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

Ramagirji Neelakantagirji ... *Appellant**

v.

Annavajjhala Venkatachallam ... *Respondent.*

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Neelakantagirji
v.
Venkatachallam.

Civil Procedure Code, O. 21, R. 71—Sale in execution—Purchaser's deposit on sale—Failure to pay balance—Proclamation and re-sale—Deficiency—Decree-holder's application to take out of original purchaser's deposit.

The purchaser at a sale in execution of a decree duly paid the 25 per cent. deposit required by the Civil Procedure Code, but made default in payment within the prescribed period of the balance of the purchase money. After fresh proclamation, the property was re-sold, but the sale proceeds were much below the original sale price and not sufficient to meet the claims of the decree-holder. The original purchaser's deposit had been ordered not to be forfeited to Government, but remained in Court and after the re-sale, the decree-holder applied for attaching the deposit as and towards his decree. *Held,* the deposit was liable to be proceeded against at the instance of the decree-holder and the application should be disposed of according to law.

Appeal from a decree of the High Court of Judicature at Madras (Sir John Wallis, C. J., Ayling and Sastri, JJ.), dated the 26th October, 1917, which reversed an order of the District Judge of Nellore (C. Krishnaswami Row, Esq.) dated the 31st January, 1916, dismissing a petition in execution preferred by the respondent.

The facts of the case sufficiently appear from their Lordships' judgment, and are closely connected with those of Appeal No. 47 of 1922 (already reported in 47 M. L. J. 809).

The Judgment of the High Court is reported in I. L. R. 41 Mad. 474 : 34 M. L. J. 156.

H. N. Sen for appellant.

L. de Gruyther, K. C. and *Kenworthy Brown* for respondent.

*P C Appeal No. 4 of 1919. 12th December, 1924.

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Sir John Edge.

12th December, 1924. The Judgment of the Board was delivered by

SIR JOHN EDGE :—This is an appeal from a decree, dated the 26th October, 1917, of the High Court at Madras which reversed an order, dated the 31st January, 1916, of the District Judge of Nellore, dismissing a petition which had been made by the respondent. In order to understand what was the decree of the High Court against which this appeal has been brought, it will be necessary to refer as briefly as possible to the position of the parties to the appeal and to the circumstances under which the decree of the High Court was made. The present appellant and the present respondent will hereinafter be referred to respectively as the appellant and the respondent.

The respondent having obtained a money decree against the Zamindar of Kalahasti for a large sum of money in execution of his decree, brought to sale on the 25th August, 1915, the rights and interests of the judgment-debtor in certain villages of Pamoor Taluq, in the district of Nellore. Those villages had been, on the 4th August, 1908, conveyed by the Zamindar for six lakhs of rupees to a person at Hyderabad, who by an agreement in writing of the same date had agreed with the Zamindar to reconvey the villages to him if the sum of six lakhs of rupees was repaid by the 31st August, 1914. That transaction constituted a mortgage by conditional sale. The property mortgaged was attached by an order of the Court, executing the decree, and the rights and interests of the judgment-debtor were by that Court ordered to be sold in execution of that decree. The Court, in compliance with R. 66 of O. 21 of the Code of Civil Procedure, 1908, caused a proclamation of the intended sale to be duly made. In the proclamation the judgment-debtor's rights and interests in the villages were stated as—

"The right of obtaining a reconveyance under the reconveyance agreement, dated 4th August, 1908, executed and given to the defendant by Raja Bahadur Narasingirji Gyanagirji, residing at Hyderabad, and all other rights and interests possessed by the defendant, in these villages."

The deed of sale and the agreement to reconvey of the 4th August, 1908, were also mentioned in the proclamation. The agreement to reconvey was No. 3 in the list of documents affecting the property to be sold, and in the column of Remarks it was stated that "Under deed No. 3 the defendant has right to have a reconveyance of the said property." The procla-

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mation gave other particulars, and in their Lordships' opinion complied with R. 66 of O. 21.

The auction sale was held on the 25th August, 1914, and the appellant was declared to be the purchaser ; his bid was Rs. 6,90,000, and he, after he had been declared the purchaser, duly paid to the officer conducting the sale, Rs. 1,72,500 as the deposit required by the Code of Civil Procedure, 1908, being twenty-five per centum of the purchase money. He, however, made default in payment within the prescribed period of the balance of the purchase money. The Court declined to grant to him an extension of time to pay the balance, and when the prescribed period for payment of the balance had expired, the Court executing the decree ordered the property to be resold. That Court ordered that the deposit should not be forfeited to the Government, and it, less poundage and other charges, remained in Court.

The appellant had, by the proclamation, notice of the rights and interests of the judgment-debtor which were to be sold, and he, or any competent lawyer whom he chose to advise him, could have examined the sale deed and agreement to reconvey of 4th August, 1908, and he must be taken to have known the effect of those documents or to have intentionally or negligently omitted to examine them. Doubtless he examined those documents, but whether he did or not is immaterial as he had, by the proclamation, notice of them.

The property was, after the prescribed period, resold by public auction on or about the 22nd February, 1915, after a proclamation that it would be sold had been duly made. In the proclamation for the resale the particulars of the property to be sold were correctly stated, the deed of sale and the agreement to reconvey of the 4th August, 1908, were mentioned as Documents 2 and 3, with the following comments as to them :—

" Sale deed executed by the defendant in favour of Raja Bahadur Narasingirji Gyanagirji for Rs 6,00,000.

" Counter reconveyance agreement executed in favour of this defendant by the aforesaid Raja Bahadur Narasingirji Gyanagirji. (This defendant has the right to get possession on a fresh sale deed being executed, of all these villages, on repayment of six lakhs of rupees within the end of August, 1914, in accordance with the two documents aforesaid.)

" (1) When in accordance with the conditions of documents Nos. 2 and 3, the defendant endeavoured to tender six lakhs of rupees within the date fixed therein Raja Bahadur Narasingirji Gyanagirji Garu evaded the tender with a fraudulent intent and went away ; for this reason, as well as for the

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reason that the transaction contained in those documents amounts to a mortgage from their nature, the said Narasingirji Gyanagirji Garu has the right to re cover only the said six lakhs of rupees, and he has no other right in the villages of this Pamoor Taluk. Therefore this property has to be sold subject to the said right as per the said documents."

The proclamation for the resale contained other particulars, and in their Lordships' opinion complied with the orders of the Code of Civil Procedure, 1908. At the resale the rights and interests of the judgment-debtor in the property were sold for Rs. 1,01,000 to one Janakiramayya, who was an agent of the decree-holder.

In November, 1914, the appellant applied to the Court which had executed the decree to order a refund to him of the deposit which had been made by him on the 25th August, 1914. On the 24th April, 1915, the respondent, alleging that on the resale a deficiency of Rs. 5,89,000 had occurred for which the appellant was liable, applied by petition to the Court which had executed the decree that it should "issue orders for recovery and payment of about Rs. 1,25,000, the amount due to him as the decree-holder in this execution sale, and also the costs of the petition, by attaching the said deposit amount of about Rs. 1,60,000." After deducting poundage and other charges, the balance of the deposit in Court appears to have been about Rs. 1,60,000. The application was clearly confined to the deposit and did not apply to the general deficiency which was the result of the resale. To that petition the appellant replied by a counter-petition on the 12th July, 1915, in which he denied that he was liable for the deficiency in price realised at the sale (resale) of the properties which was held on the 22nd February, 1915, and stated that he "had filed two petitions and an affidavit showing cause against the forfeiture of the deposit made by him on the 25th August, 1914, and claiming refund of the amount so deposited."

On the 31st January, 1916, the application of the respondent of the 24th April, 1915, was considered by the District Judge of Nellore, and he, holding that "the descriptions in the two proclamations are materially and substantially different, and the character of the property as it stood and as it was described in the first proclamation was literally and juridically different from its character as described in the second proclamation," made an order that the respondent was not entitled to the amount deposited in the Court and

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dismissed the application. From that order the respondent appealed to the High Court, and his agent filed an affidavit in the High Court in which he stated :—

"9. In the circumstances of the case, it is absolutely necessary in the interests of justice and to safeguard the interests of the appellant that this Hon'ble Court should direct that the sum now in deposit in the District Court of Nellore or such part thereof as may be necessary to satisfy the balance still due to this appellant under his decree, be retained in Court till the disposal of this appeal or be allowed to be drawn out by the respondent on proper security."

The appeal to the High Court came for hearing before two Judges of the Court who differed, with the result that the appeal was dismissed. From that dismissal the respondent appealed under the Letters Patent, and his appeal was heard by the Chief Justice and two other Judges, with the result that the appeal was allowed, and the High Court, on the 26th October, 1917, made the decree which is now appealed from to His Majesty in Council. By that decree of the 26th October, 1917, the appeal was allowed with certain costs, and the District Judge of Nellore was ordered to restore the petition of the 24th April, 1915, to its original number in the Register and to dispose of it according to law with regard to the deposit which had been paid by the appellant. In their Lordships' opinion that was the right decree to make.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *Chapman, Walker and S' ..ard.*

Solicitor for respondent : *Douglas Grant.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the Chief Court of Lower Burma.)

PRESENT :—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

Baijnath Singh ... *Appellant**

v.

Hajee Vally Mahomed Hajee Abba ... *Respondent.*

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Indian Evidence Act (I of 1872), S. 92—Evidence as to circumstances of execution of a document—Admissibility of—Mortgage of shares—Redemption after default.

Though S. 92 of the Indian Evidence Act (I of 1872) precludes oral evidence of intention for the purpose of construing deeds or proving the intention of the parties, it merely prescribes a rule of evidence and does not

*P C Appeals Nos. 21, 31 and 32 of 1923. 5th December, 1924.

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fetter the Court's power to arrive at the true meaning and effect of a document in the light of all the circumstances surrounding the transaction.

Balkishen Das v. *Legge*, L R 27 I A 58 referred to.

The Board left open the question whether the rule of English Law that a mortgage is redeemable after default has no application to mortgages of chattels or choses in action by Hindus and Mahomedans.

Three appeals and cross-appeals (consolidated) from a judgment and decree, dated the 23rd May, 1919, of the Chief Court of Lower Burma (Twomey, C. J. and Ormond, J.) affirming a judgment of the same Court (Original Side), dated the 15th March, 1917, and varying another, dated the 28th February, 1917.

The facts and arguments sufficiently appear from the judgments of their Lordships.

H. Douglas for appellant.

Stuart Bevan, K. C. and *W. Arnold Jolly* for respondent.

5th December, 1924. The Judgment of the Board was delivered by

Sir Lawrence Jenkins.

SIR LAWRENCE JENKINS :—These are consolidated appeals from two decrees of the Chief Court of Lower Burma, dated the 23rd of May, 1919, varying two decrees of that Court in its original jurisdiction, one dated the 28th of February, 1917, in Suit No. 62 of 1916, and the other dated the 15th of March, 1917, in Suit No. 60 of 1916.

Both suits were bought by Baijnath Singh for the redemption of shares alleged to have been mortgaged by him.

Suit No. 60 of 1916 is against Hajee Vally Mahomed Hajee Abba. Suit No. 62 of 1916 was originally against Hajee Mahomed Jamal, but the plaint was amended by adding the defendant Abdul Kareem Abdul Shakoor Jamal. Later, during the pendency of the suit Hajee Vally Mahomed Hajee Abba was substituted as defendant in their place, and he is now the sole defendant in both suits.

The plaintiff's right to redeem is denied on the ground that the several transactions on which the plaintiff relies were not mortgages, but sales with a right of repurchase that has expired.

The Trial Judge upheld the plaintiff's contention in both suits. On appeal, the Chief Judge decided that the transactions were mortgages. Ormond, J. held that they were sales with contracts for repurchase, but that time was not of the essence of the contracts. In the result a decree was passed by the Appeal Court in each suit that on payment by the plain-

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tiff of the sum found due the shares claimed should be transferred to the plaintiff.

Of the disputed transactions one (which will be called the Abba transaction) is the subject-matter of Suit No. 60 of 1916, the others (which will be called the Jamal transactions) are the subject-matter of Suit No. 62 of 1916.

They have been conveniently tabulated in the judgment of the Chief Judge in the following form :—

No. of shares transferred.	To—	On—	Amount paid by transferee.	Series.
			Rs.	
30,000	Abba	16th January, 1912 ...	60,000	J series of exhibits.
70,000	Jamal	15th November, 1912	130,000	A do.
10,000	do.	10th December, 1912.	20,000	B do.
17,000	do.	31st January, 1913 ...	42,500	C do
30,000	do.	18th March, 1913 ...	75,000	D do
8,520	do.	6th January, 1914 ..	21,000	E do.

The first transaction, it will be seen, was in January, 1912.

At that time, Baijnath owned 181,020 fully paid shares of Rs. 10 each in the Nath Singh Oil Company, Ltd. The certificates of these shares had been lodged with the Bank of Bengal as security for a cash credit account, and in November, 1911, the shares had been transferred, still by way of security, into the names of two nominees of the Bank. In January, 1912, the sum due from Baijnath to the Bank was two lakhs and ten thousand rupees, and the Bank was pressing for reduction of this debt.

The case alleged in the plaint is that Baijnath approached Abba for a loan and Abba offered to lend and advance to Baijnath for payment to the Bank a sum of Rs. 60,000 on the security of 30,000 of the Oil Company's shares, with interest at the rate of 75 per cent. per annum up to 17th May, 1912. It is further alleged that Baijnath agreed to these terms; that Abba at Baijnath's request paid a sum of Rs. 60,000 to the Bank of Bengal in part payment of Baijnath's indebtedness to the Bank;and that as security for the loan the Bank on the 17th January, 1912, handed over the certificates for the shares to Abba and executed a transfer of them in his favour. In the 5th paragraph of the plaint it is said that prior to the transfer Abba represented to Baijnath that being a Mahomedan it

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was contrary to the precepts of his religion to lend money at interest, and that as he was anxious it should not be known that he was charging interest at the rate of 75 per cent. per annum, Baijnath and Abba should execute bought and sold notes by which it would be made to appear that Abba had sold and Baijnath had bought 30,000 fully paid up shares for Rs. 75,000, delivery on or before the 17th of May, 1912. Though Abba does not admit the correctness of this version, it is not disputed that there was an arrangement between him and Baijnath which resulted in the first transaction of January. 1912. In performance of it the sum of Rs. 60,000 found by Abba was paid to the Bank on Baijnath's account; 30,000 of the Oil Company's shares held by the Bank's nominees as security for Baijnath's cash credit were transferred to Abba, who knew that the shares were mortgaged to the Bank; and the bought and sold notes were executed.

These notes purported to be a sale by Abba and a purchase by Baijnath of the 30,000 shares at the rate of Rs. 2|8 cum all rights and dividends, delivery on or before the 17th of May, 1912, at buyer's option.

The rate thus stipulated came to Rs. 75,000, made up of the sum originally paid and interest thereon at 75 per cent.

On the 17th of May, Baijnath was unable to pay this sum and so a renewal was arranged at the same rate of interest, and bought and sold notes were executed for the sum of Rs. 95,625 for delivery on the 31st December, 1912.

On the 14th of January, 1913, a further sum of Rs. 4,375 was paid by Abba and this, with the sum alleged to be due on the 31st of December, 1912, amounted to one lakh. The rate of interest was reduced to 30 per cent. and bought and sold notes were executed providing for the repurchase of the 30,000 shares on the 22nd of December, 1913, at the price of Rs. 1,30,000, or in other words, a lakh of rupees and a year's interest on it at 30 per cent. On the due date, fresh bought and sold notes were executed providing for the purchase on the 22nd December, 1914, at Rs. 1,78,750, that is to say, the sum of Rs. 1,30,000 with interest to the 22nd of December, 1914, at 37 1|2 per cent. to which the rate was then enhanced. No further bought and sold notes were executed in connection with this transaction. According to Baijnath, this was in consequence of an oral agreement in November or December, 1914, providing for the reduction of interest to 9 per cent. The proof of this agreement will be considered later.

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In both the lower Courts it was contended by Abba that this transaction was a sale and repurchase, and that time being of the essence of the contract, Baijnath's right to repurchase had expired. The decision was against this contention and Abba appealed to His Majesty in Council. But he has withdrawn that appeal, stating that he no longer objects to the redemption of the shares. In Suit No. 60, therefore, the decision that Baijnath is entitled to redeem the shares in the Abba transaction stands and cannot be controverted.

Abba maintains that this cannot affect his contention that the Jamal transactions, to which Suit No. 62 relates, give Baijnath no right of redemption. The learned trial Judge, however, points out that the transaction of the 16th of January, 1912, was the commencement of a series of similar transactions, that a certain course of procedure was then settled, and that this influenced and possibly accounted for the procedure adopted in the later transactions.

Having regard to the part Abba took in arranging the later transactions, and his pecuniary participation in two of them, their Lordships agree with this view.

The first of the Jamal transactions was on the 15th of November, 1912, and in form, it follows precisely the lines of the Abba transaction of January, 1912.

The number of shares transferred was 70,000, the transferee was Jamal, the amount treated as paid was Rs. 1,30,000, and the transfer was from the nominees of the Bank of Bengal by whom (to the transferee's knowledge) the shares were held as security for Baijnath's cash credit. Though Abba's name does not appear, he was interested in 27,500 of the 70,000 shares transferred.

Of this sum of Rs. 1,30,000 the amount then advanced was one lakh ; the balance of Rs. 30,000 represented a sum already due from Baijnath to Jamal.

Bought and sold notes were executed as in the case of the Abba transaction, the date of delivery was the 15th November, 1913, the rate of interest was 37 1|2 per cent., and the purchase price was Rs. 1,78,750. On renewal, further bought and sold notes were executed in November, 1913, the date of delivery being the 15th November, 1914. The price was Rs. 2,45,781-4-0, which represented the previous amount of Rs. 1,78,750 with interest for one year at 37 1|2 per cent., calculated from the expiration of the previous bought and sold

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notes. There were no further renewals and this is attributed, as in the Abba transaction, to the agreement for reduction of interest.

It is true, as was laid down in *Balkishan Das* v. *Legge*(1) that under S. 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this case the section and the ruling have no application to it.

The preamble to the Evidence Act recites that " it is expedient to consolidate, define and amend the Law of Evidence, " and S. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. To these circumstances their Lordships will briefly advert.

At the date of their transfer the shares were held, as the transferee knew, as security for Baijnath's debt to the Bank, and it does not appear that the transfer was effected in exercise of any power of sale in the Bank. The money paid on that transfer went in reduction of the Bank's debt and there is nothing to indicate that the transferee acquired a greater right than was vested in the transferor. The amount paid by the transferee was Rs. 1,30,000, a sum which, as the Chief Judge remarks, had no relation to the market price of the shares, but was made up of Rs. 1,00,000 advanced at the time at 37 1|2 per cent. interest and Rs. 30,000, a debt already due. The same remark applies to the purchase price in the succeeding bought and sold notes, the price being made up of that entered in the preceding notes with the addition of interest calculated in advance to the new date for delivery. Then, again, the recognition of Baijnath's claim to dividends, whether he paid the price in the notes or not, points, if anything, to the shares being held by the transferee as a security and not as a purchaser, as does the fact that the transfer fees were paid by Baijnath and that no brokerage was paid.

These are all indications of the true nature of the transaction; they may properly be taken into consideration and their effect is to favour Baijnath's contention.

1. (1900) L R 27 I A 58.

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Of the other Jamal transactions, three only are now in dispute, for the 30,000 shares transferred on the 18th March, 1913, have been retransferred to Baijnath : these three need not be separately examined, for it is not suggested that they can be differentiated from the first, which has been discussed in detail.

Over and above the several matters to which attention has been drawn as indications that the Jamal transactions must, like the Abba transaction, be treated as a mortgage, in support of Baijnath's contention, great reliance is placed on two documents, Exs. F and G.

Ex. F is an instrument of the 12th June, 1913, made between Baijnath of the one part and Jamal and Abba of the other part. After a recital that Baijnath had transferred several wells and well sites to the Oil Company, for which he had not been allotted shares, it was agreed that in consideration of Rs. 1,000 paid as earnest money, Baijnath would sell and transfer to Jamal and Abba every share which might be allotted to him at any time thereafter in the Oil Company for any well or well sites transferred by him at the price of one rupee per share.

The genuineness of this agreement is not disputed and it is common ground that it was entered into for the purpose of preventing Baijnath from flooding the market with new shares. The draft was handed to Baijnath. He took it to his legal adviser, Mr. Halkar, who told Baijnath "that it would not be good to sign the agreement." The reason is obvious. By the terms of Ex. F, Baijnath bound himself to transfer shares that might be allotted to him in the Oil Company at Re. 1 each, though at the time he was buying back 30,000 shares at Rs. 4-5-4 per share. The agreement was unqualified and did not even contain a provision for repurchase, though, admittedly, the object was merely to protect the value of the shares that had been transferred in the several transactions. In accordance with his advice, Mr. Halkar prepared another draft. Baijnath deposes that it was given to Abdul Sattar, and after being kept by him for a day was returned with the assurance that it was all right and could be typed. The draft was accordingly typed by Mr. Halkar and the typed copy is Ex. G.

It is expressed to be dated the 12th June, 1913, and to be between Jamal and Abba of the one part and Baijnath of

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the other. After recitals that Baijnath had transferred his 1,57,000 shares of the Oil Company to the names of Jamal and Abba as security for a loan on account, and that the shares were in their possession and names on which they had a lien for the amount advanced, and that Baijnath was to get a further allotment of shares in the Company which were to be sold by him to Jamal and Abba, in the witnessing part it is declared that Jamal and Abba had a mere lien on the shares and were not the owners of the shares, and that they should retransfer the shares to the name of Baijnath on his repaying the loans.

On the document are what purport to be the signatures of Jamal and Abba as executants and of A. H. N. Jamal, otherwise known as Abdul Sattar, as an attesting witness, and their close resemblance to the genuine signatures of these three persons is not contested. Baijnath swears to the execution of the document, but Jamal and Abba declare it is a forgery. Abdul Sattar, whose name appears as the attesting witness, is a son of Jamal, and though he came with his father to Court, he did not go into the witness-box to deny his signature.

The Trial Judge held the signatures of Jamal and Abba and of the attesting witness to be genuine.

The learned Judges on appeal came to a different conclusion. The Chief Judge was not satisfied that Jamal and Abba signed Ex. G and thought it probable that the document was concocted not long before the filing of the suit in 1916. Ormond, J. thought it was prepared after Jamal had taken up the position that the shares could no longer be redeemed or repurchased because the due dates had expired.

In their Lordships' opinion the view of the Appellate Court as to the time at which the document was prepared is disproved by the evidence of Mr. Halkar. He deposes that he prepared the document in June, 1913, in the circumstances already stated, and he is able to identify it by a correction in it initialled by him at the time. In Suit No. 60, he gave evidence to the effect that he actually had a conversation with Abba about this agreement in June, 1915. Their Lordships are satisfied that Ex. G was prepared in June, 1913, and that the Appellate Court's view as to the date and purpose of its preparation is erroneous.

The Chief Judge, in arriving at his conclusion, adverse to the execution of Ex. G, remarks on the fact that while in

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Ex. F the signature of Abba has the word Mohamed in full, in Ex. G it has only the first syllable. But it has been shown in the argument that on other documents Abba has written his signature as in Ex. G, so that the Chief Judge's comment loses its force.

The learned Trial Judge examined the evidence given before him with critical care. After commenting on the manner in which it was given and weighing the probabilities, he came to the conclusion that the denial before him of the signatures was not true, with the result, as he expresses it, that he was entirely satisfied that Jamal and Abba did execute G. The judgments in the Appellate Court disclose no sufficient ground for disturbing the first Court's appreciation of the evidence, and the finding that Ex. G was duly executed will therefore stand.

Apart from Ex. G their Lordships would be prepared to hold that the transactions in suit are mortgages ; if this document be accepted this conclusion is placed beyond controversy.

But then it has been contended that even if the transactions were mortgages the English rule of law that a mortgage is redeemable after default has no application to mortgages of chattels or choses in action by Hindus and Mahomedans and that consequently the right of redemption was lost. Even if this were a correct statement of the law in Burma (a point on which their Lordships express no opinion), the Lower Courts have rightly held that in the circumstances of this case the period for redemption cannot be held to have expired.

The only other point is as to the rate and period of interest to be allowed. Paragraph 26 of the plaint in Suit No. 62 of 1916 alleges that about the end of 1914 Baijnath was desirous of paying off the amount of his indebtedness by borrowing from other persons ; that the defendant requested Baijnath not to make any definite arrangement to raise loans as the Company had commenced to pay large dividends, and that the amount due would shortly be repaid out of the dividends; but the defendant undertook to charge Baijnath after the periods agreed to between the parties interest at 9 per cent. per annum for further interest and agreed to credit all interest received by him towards the amount due ; and that Baijnath agreed to the defendants' proposal and consented to allow the amount due to be repaid at Baijnath's convenience.

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The plaint in Suit No. 60 of 1916 contained allegations to the same effect. In both suits there was an issue as to whether there was any such agreement, and, if so, what was its effect. The first Court decided this issue in Baijnath's favour: the Appeal Court decided against him.

The Judge of the Trial Court on the evidence found that Baijnath could have raised the money at 9 per cent. per annum, and he gives an account of how this part of the case was treated before him, which leaves no doubt as to the correctness of his finding.

Accepting it as their Lordships do, it is inconceivable that Baijnath would have continued his liability for the extortionate interest payable under the original transactions, and the finding of the first Court must prevail.

Baijnath has objected that as the delay in payment off of the mortgages was due to the wrongful repudiation of his right to redeem, Abba is not entitled to subsequent interest. The answer is that this objection is opposed to the decision of the First Court, and from that decree no appeal was preferred by Baijnath. Therefore, the objection cannot now be entertained.

The result, then, is that Abba has failed in his contention that the transactions in Suit No. 62 are not mortgages, and also so far as interest in excess of 9 per cent. per annum was awarded from the date of the agreement for reduction of interest. Payments have been made into Court by Baijnath under the decrees of the Lower Court, but it does not appear clearly how the money has been dealt with or whether any further account or payment by way of restitution or otherwise is necessary. These are matters for determination (if necessary) by the Court in Burma.

Their Lordships are of opinion that the decrees of the Appellate Court must be set aside and that the appeals from the Court of first instance ought to have been dismissed with costs by the Appellate Court, and they will humbly advise His Majesty accordingly. Abba will pay the costs of these consolidated appeals.

Solicitor for appellant : *A. M. Bramall.*

Solicitors for respondent : *Henry Hilbery and Son.*

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Kariya Goundan and another ... *Petitioners** (*Petitioners—Plaintiffs*)

v.

Tirukkaivelu Chetty and others... *Respondents* (*7th, 22nd, 23rd, 24th, 25th and 26th defendants*).

Kariya Goundan v. Tirukkaivelu Chetty.

Civil Procedure Code, O. 6, R. 17—Amendment of plaint—Inadvertent omission—Discretion of Court—Revision—Interference—Civil Procedure Code, S. 115.

The powers of amendment conferred on Courts under the present Civil Procedure Code are much wider than before and all such amendments should be allowed as would enable the Court finally to determine all matters in controversy between the parties. It is open to the High Court to interfere in revision with an order of the Lower Court refusing an amendment and thus avoid the trouble, expense and delay that would be caused by refusing to allow the amendment at that stage.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Munsif, Dindigul, in I. A. No. 910 of 1922 in O. S. No. 799 of 1920 dated the 18th February 1924.

T. L. Venkatrama Aiyar for petitioners.

A. Sundaram for respondents.

The Court delivered the following

JUDGMENT :—I think this petition should be allowed. The petitioners as plaintiffs instituted a suit for redemption of property mortgaged by their father. They subsequently applied to amend their plaint by including a claim against defendants 5 and 7 as the substituted mortgagees for the reduction of the amount that may be found as damages due and payable to them in respect of the alienation effected by defendants 5 and 7 of a portion of the mortgaged property. The learned District Munsif dismissed the petition characterising it as belated and vexatious. I think he was wrong. The powers of amendment conferred on the Courts under the present law are much wider than formerly and it has often been stated by very eminent Judges that all amendments should be allowed as would enable the Court finally to determine all matters in controversy between the parties. I have no doubt whatever that this claim which is now sought to be included in the plaint by way of amendment was omitted to be so included only by inadvertence or ignorance. But the learned Counsel for the respondents argued that the mere fact that a wrong

*C. R. P. No. 499 of 1924. 3rd December, 1924.

Kariya Goundan v. Tirukkaivelu Chetty.

order has been made by the Court below will not justify this Court in interfering at this stage in revision. I agree it is only in extraordinary circumstances such interference would be justifiable. In my opinion such interference would be justified in this case in view of the trouble, expense and delay that would be caused if the amendments were not carried out now. It is clear that if this amendment should not be made now the case will have to proceed in the Court of first instance and in the Court of Appeal, if the appeal should be allowed, the case will have to be remanded and fought all over again. The learned Counsel for the respondents has drawn my attention to certain cases in which it was held that though the amendment applied for to be made by the plaintiff was proper and was refused by the Lower Court, that was no reason for the High Court interfering by way of revision at that stage. I have not been able to see what was the nature of the amendments that were applied for to be made in those cases. However that may be, all those cases have been recently considered by the learned Judges of this Court, specially in the case of *Sri Poosapathi Ramachandra Raju* v. *Sri Rajah Vachavayi Venkata Subbayamma* (1) and this decision of Mr. Justice Kumaraswami Sastri has since been followed by several of the learned Judges of this Court. There is no doubt whatever that this Court having the right to revise even in respect of the proceedings in pending suits would undoubtedly do so in proper cases and the only question is whether having regard to the circumstances of this case the Court should interfere or not. Having regard, as I have already said, to the amount of trouble, expense and delay that would be caused if the amendment should not be carried out immediately, I am of opinion that the order of the District Munsif should be set aside and I accordingly set it aside.

Respondents 1 to 5 will pay the costs of the petitioners in this Court.

This petition has been withdrawn by the petitioners' vakil so far as the 6th respondent is concerned, who is a minor and for whom a guardian has not been appointed.

A. V. V. *Order set aside.*

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1. (1915) 29 M L J 53.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Durgamma and others ... *Appellants** (*Plffs.* 1 *to* 25)

v.

Kechammayya and others ... *Respondents* (1*st*, 2*nd and* 4 *to* 10 *defendants*).

Durgamma *v.* Kechammayya.

*Fraud—Decree obtained on mortgage—Suit for declaring the decree not binding—Fraud alleged only in connection with execution of deed—*Ex parte *decree against mortgagors—Continuation of fraud—Allegation, if necessary.*

Some of the members of an Aliyasanthana family, including the *Ejaman*, executed a mortgage and on the basis of it an *ex parte* decree was passed in a suit against them. Some other junior members filed a suit for a declaration that the decree was not binding on them, and in the plaint made various allegations of fraud in connection with the execution of the mortgage deed but not regarding the conduct of the mortgage suit. *Held*, if the plaintiffs succeed in establishing a case of fraud and collusion in executing the mortgage, allowing the suit to proceed *ex parte* would only be a continuation of the original fraud and hence a specific allegation that the fraud continued during the conduct of the suit was not necessary. The plaint in such a case should not be rejected as disclosing no cause of action.

The case would be different if the defendants in the prior suit were different from the executants of the mortgage. In such a case, the plaint must contain further allegations about the conduct in defending the suit, *e. g.*, not raising an obvious plea open to the defendants.

Second Appeal against the decree of the Court of the Subordinate Judge of South Kanara in A. S. No. 189 of 1921 (A. S. No. 125 of 1921 on the file of the District Court), preferred against the decree of the Court of the Additional District Munsif of Kasargod in O. S. No. 36 of 1920 (O. S. No. 85 of 1919 on the file of the Court of the Principal District Munsif).

B. Sitarama Rao for appellants.

K. Yegnanarayana Adiga for respondents.

The Court delivered the following

JUDGMENT :—The suit was brought by the junior members of an Aliyasanthana family for declaration that a decree obtained against certain other members (including the two managers) is not binding on them. The plaintiffs were not parties to the former suit. The Courts below dismissed the suit on the ground that the plaint disclosed no cause of action. The plaint made various allegations of fraud in connection with the execution of the mortgage deed on which the former suit was laid but made no further specific allegations of

*S. A. No. 1443 of 1922. 5th November, 1924.

Durgamma v. Kechammayya.

fraud in the conduct of the former suit. In the cases relied on by the Courts below [*Chinnayya* v. *Ramanna* (1) and *Gandi Appa Razu* v. *King-Emperor* (2)] the plaintiff in the last suit was a party to the prior decree and was bound by it unless the decree was obtained by fraud. Those cases can apply to the present case only on the footing that the plaintiff, though not a party to the former suit, was represented in it by the 5th defendant therein (*Ejamanthi*) and by the 3rd defendant therein (described as a manager along with the 5th defendant). Now it is clear that if the executants of the mortgage document acted fraudulently and collusively in executing the documents and they were the defendants in the suit and allowed it to proceed *ex parte,* they were only continuing the original fraud and there can be no new fraud to allege or prove. If the plaintiffs succeed in establishing fraud and collusion in respect of the execution of the document, they have also succeeded in establishing that the non-defending of the former suit is also fraudulent,—the fraud in the suit being merely a continuation of the original fraud. In the present case of the seven executants of the mortgage document six (including the manager) were parties to the former suit (the seventh being dead). In such a case the plaint must be construed as alleging fraud throughout from the execution of the document to the passing of the decree. It would be no doubt different, if the defendants in the former suit were different from the executants of the mortgage. In such a case, the plaintiff ought to make a further allegation about the conduct of the defendants in defending the suit such as that the defendants did not raise an obvious plea open to them or that the executants of the document were not managers at the time—conduct showing gross negligence equivalent to fraud and collusion. An example of such a case is *Yusuf Sahib* v. *Durgi* (3). In the present case the plaint attributes initial fraud to the defendants in the suit at the stage of the execution of the document. I do not think it necessary for the plaintiff to make this redundant allegation that the fraud continued during the conduct of the suit. I think the plaint discloses a cause of action. The facts ought to be fully ascertained before the suit can be disposed of. If the plaintiffs establish fraud in the execution of the mortgage

1. (1913) I L R 38 M 203 : 25 M L J 228.
2. (1919) I L R 43 M 330 : 38 M L J 194.
3. (1907) I L R 30 M 447 : 17 M L J 260.

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the decree is equally vitiated by fraud and cannot bind the plaintiffs.

The decrees of the Courts below are reversed and the suit remanded for disposal according to law. Costs to abide the result. Court-fee in first appeal and second appeal should be refunded to plaintiffs.

T. S. V. ——— *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

P. Sambasiva Sastrial ... *Appellant** (*Plaintiff*)

v.

Ramaswami Sastrial and others ... *Respondents* (*Defendants* 1 *to* 3, 5 *to* 20 *and Legal Representative of the* 4*th defendant*).

Sambasiva Sastrial v. Ramaswami Sastrial.

Hindu Law—Widow—Surrender—Essentials of—Division of properties among reversioners—Validity—Family settlement—Estoppel—Adoption—Presumption of authority.

In order that a surrender by a Hindu widow may be valid there must be the self-effacement of the widow and it should not be a device to divide the estate with the reversioners. A stipulation therein that the reversioners are to divide the property in shares different from what they would get as reversioners does not make the surrender invalid. The transaction in such a case can also be treated as a family arrangement and the parties thereto are estopped from resiling from its terms.

Where an adoption which took place in 1867 was acted upon without being questioned by anybody till the adopted son died, a Court can presume authority to adopt.

Second Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 64 of 1921 preferred against the decree of the Court of the District Munsif of Valangiman in O. S. No. 65 of 1919.

The Advocate-General and *K. S. Sankara Aiyar* for appellant.

S. Panchapagesa Sastri and *K. Bhashyam Aiyangar* for respondents.

The Court delivered the following

JUDGMENT :—The finding about the adoption must be accepted. It was acted upon from 1867 to 1873 when the adopted boy died without being questioned by any relation. The reversioner, Ramachandra Sastri, lived only for three months after the death of Bhagirathi and it is not clear that he left a son or other reversioner who could claim the property. It is true he left a widow but her inaction in not claiming the property is not inexplicable. The Subordinate Judge is right

*Second Appeal No. 666 of 1922. 12th November 1924.

Sambasiva Sastrial v. Ramaswami Sastrial.

in presuming the authority for an adoption which took place in 1867 and which was not questioned.

It is next argued that Bhagirathi and her daughters prescribed only for a mother's and daughter's estates respectively and Ex. XVIII is relied on for this purpose. Ex. XVIII throws no light on the estate prescribed by Bhagirathi or Valambal. Even as to Abhirami Ammal, it is not clear that she claimed a daughter's estate. The utmost that can be said for the appellant is that the document is dubious.

Ex. XVIII is perfectly valid as a surrender. The conditions of a valid surrender, *i. e.,* the self-effacement of the widow and the absence of a device by the widow to divide the estate with the reversioners are satisfied [see *Sureshwar Misser* v. *Maheshrani Misrain* (1)]. The stipulation that the reversioners are to divide the property in shares different from what they would get as reversioners (3|5 and 2|5) does not make the surrender invalid.

The document is also therefore good as a family arrangement—such arrangement being arrived at by means of a surrender [*see* my judgment in Appeal No. 368 of 1921]. The plaintiff being a party to Ex. XVIII is also estopped from putting forward the present claim. [*Kanhai Lal* v. *Brij Lal* (2) and *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (3)].

The Second Appeal fails and is dismissed with costs one set. The pleader's fee is to be divided between the 1st respondent and respondents 5, 9 to 11 and 20. The first respondent will be entitled to the whole of the printing charges.

T. S. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

Krishnaswami Thevan and others .. *Appellants* (Defendants Nos. 7 and 4 to 6)*

v.

Pulukaruppa Thevan, minor, by his mother and guardian Krishnammal and others ... *Respondents (Plaintiff and defendants Nos. 1 and 24)*

Krishnaswami Thevan v. Pulukaruppa Thevan.

Hindu Law—Partition—Suit by next friend of minor plaintiff—Birth of other coparceners pending suit—Shares on partition.

*Appeal No. 188 of 1922. 11th December, 1924.

1. (1920) I L R 48 C 100 at 108 : 39 M L J 161 (P C).
2. (1918) I L R 40 A 487 : 35 M L J 459 (P C).
3. (1923) I L R 45 A 339 (F B).

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The share of a minor plaintiff suing through a next friend for partition is not liable to be diminished owing to the birth of another son to his father conceived after the date of the filing of the plaint but born before the date of the preliminary decree.

Chelimi Chetty v. *Subbamma* I. L. R. 41 Mad. 442 ; *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple*, I L R 42 All 461 distinguished.

Ramalinga Annavi v. *Narayana Annavi* I. L. R. 45 Mad. 489 ; *Soundararajan* v. *Arunachalam Chetty* I. L. R. 39 Mad. 158 referred to.

Appeal against the decree of the Court of the Additional Subordinate Judge of Ramnad at Madura in O. S. No. 16 of 1919 (O. S. No. 17 of 1919, Sub-Court of Ramnad).

K. S. Champakesa Aiyangar for appellants.

K. Rajah Aiyar for respondents.

The Judgment of the Court was delivered by

Spencer, J.

Spencer, J. :—This is a suit brought by a minor represented by his mother as next friend for partition of family property. He impugned several alienations made by his father, the 1st defendant, as not binding on his interest ; and the Subordinate Judge passed a preliminary decree for partition. The 7th defendant, and the defendants 4, 5 and 6, who are the legal representatives of the 3rd defendant, appeal. The 7th defendant is an alienee of the first item and the others are alienees of items 4, 7 and 28. Their vakil, without directly attacking the findings of the Subordinate Judge that the alienations of these items are not supported by consideration and are not binding on the plaintiff, has argued that as the 1st defendant admitted having received consideration, these alienations are binding at least on his share, and that they may in the course of partition be allotted to his share, and that if this is done the possession of these appellants will not be disturbed. The items in dispute measure altogether 7 acres and 40 cents and the items found to belong to the family as per A schedule measure 27 acres 83 cents. The plaintiff-1st respondent has no objection to the items which have been alienated in favour of these appellants being apportioned to the share of the 1st defendant at the final partition if this can be done without detriment to the plaintiff's interest. There will be a direction to that effect added to the preliminary decree of the Lower Court.

As regards costs the Lower Court directed that the costs of the suit in that Court should be recovered from the defendants 1 and 7 as the 7th defendant wholly failed and as the 1st defendant had been enjoying the income of the lands. It will

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Spencer, J.

be equitable that the 7th defendant should bear the costs of the suit in the Lower Court in proportion to the value of the item in which he is interested, and the vakil's fee should be calculated accordingly. The balance will be recoverable from the 1st defendant. With these modifications the appeal is dismissed with costs.

The Memorandum of Objections filed by the first respondent coming on for hearing on Thursday and Friday, the 27th and 28th days of November, 1924 respectively.

The Court delivered the following Judgment :—

Spencer, J.

Spencer, J. :—This suit was brought by a minor plaintiff represented by his mother as next friend for partition of the properties belonging to the undivided Hindu family consisting of himself and his father the 1st defendant. It involves a new and interesting point of Hindu Law. After the institution of the suit on 31st January, 1919, another son was born in May 1920 to the 1st defendant by a second wife. Conception must have taken place about August, 1919, certainly after the filing of the plaint. This after-born son has been brought on the record as the 24th defendant.

On the principle that if a suit for partition is instituted by a co-parcener who is *sui juris* the mere filing of the plaint effects a severance of the joint status of the family, but that in the case of a minor it is the Court that decides whether there is to be a division or not, the Lower Court has found the 24th defendant to have come into existence before there was any change of status and has awarded the minor plaintiff a one-third share instead of one-half. The Subordinate Judge quotes *Chelimi Chetty* v. *Subbamma* (1) and *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple* (2) as his authorities for so deciding. The learned Judges (Abdur Rahim and Oldfield, JJ.) who decided the former case, were, if I may say so, perfectly right in saying that it should not depend on the choice or option of any person calling himself the next friend of a minor to say whether the family to which the minor belongs shall in future be joint or separate and that the law has left it to the Court that hears the minor's partition suit to decide whether it is in the interest of the minor that he should become divided. But in cases where the Court gives a decree to a minor for partition, it seems to me, with due respect, that there should

1. (1917) I L R 41 M 442 : 34 M L J 213.
2. (1920) I L R 42 A 461.

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be no departure from the general rule that every suit has to be tried on the cause of action as it existed at the date of its commencement [vide *Rai Charan* v. *Biswanath* (3)]. Therefore in my judgment the only sound principle will be to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint. It is true that there can be no division of status unless the Court sees fit to decree it, but there is no reason why the Court should not make its decree take effect from the date of the institution of the suit.

If a suit abates owing to the death of the only other coparcener, as in *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple* (2) or if the plaintiff comes of age during the pendency of the suit and elects to abandon or repudiate it under O. 32, Rr. 12 and 13 of the Code of Civil Procedure no change of status takes place because the suit does not proceed to the stage of decree, not because the filing a partition suit by a minor has not by itself the effect of causing a division of status. It does have that effect when it ends in a partition decree.

In *Krishna Lal Jha* v. *Nandeshwar Jha* (4) it was held that even a minor might make through his next friend an unequivocal expression of his intention to become separate and that, if he did so, the subsequent birth of another member into the family would not cause any diminution in his share of the family property. In that case the birth took place after the passing of the preliminary decree, but in the view taken by the learned Judges, who were not referred to the decision in *Chelimi Chetty* v. *Subbamma* (1) it was not that date but the date of the institution of the suit that was the date when severance took place, if at all. That is the law as regards major coparceners. Vide *Soundararajan* v. *Arunachalam Chetty* (5) and *Ramalinga Annavi* v. *Narayana Annavi* (6).

As soon as severance takes place the plaintiff's share is not liable to decrease birth thereafter of other coparceners. Vide *Chinnu Pillai* v. *Kalimuthu Chetty* (7). As regards the date from which divided status begins, I fail to see why any distinction should be made between adults and minors so far

1. (1917) I L R 41 M 442 : 34 M L J 213. 2. (1920) I L R 42 A 461.
3. (1914) 20 C L J 107. 4. (1918) 4 Pat L J 38.
5. (1915) I L R 39 M 159 : 29 M L J 793 (F B).
6. (1922) I L R 45 M 489 : 43 M L J 428.
7. (1911) I L R 35 M 47 at 55 and 59 : 21 M L J 246 (F B).

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as their shares are subject to alteration in consequence of events that occur between the commencement and the end of a partition suit.

As my learned brother agrees with me upon this point, the memo of objections is allowed and plaintiff's right to a one-half share will be declared in the preliminary decree. He will consequentially be entitled to an account from 1st defendant of profits from the date of suit and the Lower Court's decree will be modified accordingly with costs of the memorandum of objections.

Devadoss, J.

Devadoss, J. :—The main question raised by the 1st respondent in the memorandum of objections is, whether the share of a minor plaintiff who sues his father for partition is liable to be diminished owing to the birth of another son conceived after the date of the filing of the plaint but born before the date of the preliminary decree.

The plaintiff, who is a minor, is the son of the 1st defendant. The suit was filed on 31st January, 1919. The 24th defendant was born to the 1st defendant in June, 1920. Issues were settled in the case on 8th October, 1919 and after the birth of the 24th defendant an application was made to bring him on record. That application was filed on 26th September, 1920 and an additional issue was framed on 21st July, 1921. The Subordinate Judge gave a decree to the plaintiff for one-third of the family properties. The contention of Mr. Rajah Aiyar is that the 24th defendant having been born after the suit was filed the plaintiff's share is not liable to be diminished to one-third.

It is well settled that an unequivocal unilateral declaration of a member of a joint family of his intention to be separated from the other members is sufficient to give him a divided status. *Musammat Girja Bai* v. *Sadashiv Dhundiraj* (8) and *Suraj Narain* v. *Iqbal Narain* (9). It was decided by a Full Bench of this Court in *Soundararajan* v. *Arunachalam Chetty* (5) that a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. On the strength of this decision Mr. Rajah Aiyar contends that on the filing of a plaint by a minor through his next friend he becomes divided from the other members of the family. If the plaintiff were a major

5. (1915) I L R 39 M 159 : 29 M L J 793 (F B).
8. (1916) 20 C W N 1085.
9. (1912) L R 40 I A 40 : 24 M L J 345.

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Devadoss, J.

no doubt on the filing of a plaint or on the sending of a proper notice he would become divided from the other members of the family. But the law is quite clear that a minor cannot enter into a valid contract and cannot enforce a partition by his mere volition. In an action for partition by a minor through his guardian or next friend the Court has to see whether there are circumstances which would justify granting relief to the minor and whether it would be in the interests of the minor and to his advantage to separate him from the family. Till the Court determines the question whether a partition should be effected in favour of a minor the joint status of the minor with the other members of the family is not in any way severed. It is only by the decree of the Court that a minor becomes divided from the other members of the family. No doubt in the case of a suit by an adult member or in a partition at the instance of an adult member a minor may become separated from the other members but where the minor himself comes into Court with a prayer for partition from the other members of the family it is the Court that determines whether he should be divided or not and therefore it is not the act of the next friend or the guardian that determines the issue whether there should be division or not, but it is the judgment of the Court which determines the issue, and therefore the mere filing of a plaint cannot bring about a divided status so far as a minor plaintiff is concerned. This question was decided by a Bench of this Court in *Chelimi Chetty* v. *Subbamma* (1). The facts in that case were a minor brought a suit for a partition of his share. Pending the suit, the minor plaintiff died and the mother applied to be brought on record as the legal representative of the minor plaintiff and asked for permission to continue the suit. The Subordinate Judge held that no cause of action survived to the mother and rejected her application. On appeal the District Judge set aside the order of the Subordinate Court holding that the mother was entitled to continue the suit as the legal representative of the plaintiff. Abdur Rahim and Oldfield, JJ. held that the cause of action did not survive to the mother. Abdur Rahim, J. observes at p. 445 :—" In the case of an adult he has not to give any reasons why he asks for partition but has simply to say that he wants partition, and the Court is bound to give him a decree. In the case of a minor the law gives the Court the power to say whether there should be a division or not and we think

1. (1917) I L R 41 M 442 : 34 M L J 213.

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that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor."

Mr. Rajah Aiyar wanted to contend that this decision is wrong and that on the filing of the plaint by a minor he becomes divided from the other members of the family. Such a contention is opposed to the principle that it is the Court that determines whether there should be a partition of the family property at the instance of the minor plaintiff and not any relation guardian or next friend. Whatever may be the circumstances which justify a guardian in bringing a suit on behalf of a minor, there is no warrant for saying that it is his view that should prevail. The matter is entirely for the decision of the Court and therefore it is opposed to principle as well as to policy to hold that a minor or anybody on his behalf has the power to give him a divided status without the decree of a competent Court.

Mr. Rajah Aiyar relied for his contention upon a decision in *Krishna Lal Jha* v. *Nandeshwar Jha* (4). In that case the learned Judges remark at page 48 :— "We are unable to accede to the proposition that under Hindu Law a minor cannot express either himself or through his guardian an intention to do what was clearly not against his own interests." With due respect to the learned Judges, I am unable to accept the argument. When the law is clear that there cannot be a partition at the instance of a minor except under a decree of Court it is not proper to hold that the guardian or the next friend could do what the Court alone is competent to do. The decision in *Chelimi Chetty* v. *Subbamma* (1), though of August, 1917, was evidently not brought to the notice of the learned Judges of the Patna High Court. There is no reason to doubt the soundness of the decision in *Chelimi Chetty* v. *Subbamma* (1).

An argument was advanced by Mr. Rajah Aiyar that in a partition action by a minor the Court acts upon the representation of the guardian or next friend and in a way approves of the action of the guardian ; in other words, the Court approves of the conduct of the guardian and grants his prayer and therefore it sanctions what the minor through his guardian or next friend wished to be done ; and he relied

1. (1917) I L R 41 M 442 : 34 M L J 213.
4. (1918) 4 Pat L J 38.

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upon *Kancherla Kanakayya* v. *Mulpuru Kottayya and others* (10) as supporting his contention. In that case the next friend of a minor transferred a decree obtained on behalf of a minor without the leave of the Court. The High Court held that the leave to transfer the decree might be given at any time. This case does not support Mr. Rajah Aiyar's contention. In a partition action, the Court does not merely sanction what the guardian or next friend has done ; it hears and determines on the evidence whether the minor plaintiff should be given his share of the family property by effecting a partition or not. It does not merely sanction what the minor wants but it comes to a conclusion on the evidence as to whether the prayer of the minor plaintiff should be granted or not.

But the question whether the plaintiff's share is liable to be diminished by the birth of the 24th defendant is not concluded by the decision in *Chelimi Chetty* v. *Subbamma* (1). Though the minor plaintiff becomes divided in status from the 1st defendant only by reason of the decree of the Court, yet his share in the family property is what it was on the date of the plaint. The Court determines on the evidence before it whether on the date of the plaint the minor plaintiff was entitled to partition or not. In the case of an adult plaintiff, his share is not liable to be diminished by the birth of a member who was not conceived at the time of the filing of the plaint. If a member of a joint Hindu family alienates his share, the alienee is entitled to the share of his alienor as on the date of the alienation and not as on the date on which he obtains a decree for partition. It is difficult to see why in the case of a minor plaintiff a different principle should prevail. In the case of an adult plaintiff suing for partition the Court has not to determine whether he is entitled to partition or not. It is his undoubted right to claim partition. Nobody has a right to deny him his share if he is entitled to one. In the case of a minor plaintiff, he is entitled no doubt to a share. All that the Court is asked to determine is whether in the circumstances of the family it is advantageous to the minor plaintiff to be separated from the other members of the family or not. Though it is the Court that determines that question its determination does not affect the share of the minor plaintiff which was his on the date when he filed his

1. (1917) I L R 41 M 442 : 34 M L J 213.

10. (1921) 41 M L J 75.

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Devadoss, J.

plaint. If the 24th defendant had been conceived before the date of the filing of the plaint, no doubt the plaintiff would be only entitled to one-third share, but the 24th defendant was born only in June, 1920. So he could not have been *ventre sa mere* on 31st January, 1919, and no such case is put forward on his behalf. So he must have been conceived long after the plaint was filed. On the date when the plaintiff filed his suit, he was entitled to a half share and the mere fact that the Court took two years to decide the suit is not a ground for diminishing his share which was a moiety on the date of the suit. Supposing in a partition suit at the instance of a minor several unnecessary contentions are raised, and the case takes a number of years before it is ready for trial, and before it is decided several members are added to the family, is it reasonable to hold that the plaintiff for no fault of his should be deprived of the share which he was entitled to on the date he filed his plaint either owing to the obstructive conduct on the part of the defendants or to the unavoidable delay in the Courts ? I think it is but reasonable to hold that the plaintiff's share is not diminished owing to the birth of the 24th defendant before the preliminary decree was passed. The plaintiff is therefore entitled to a half share of the joint family property and not to one-third as found by the Subordinate Judge.

The next question is whether the 1st defendant is liable to account for the income. In a partition suit the managing member of the family is not liable to account for the income and profits ; but in this case the plaintiff was not supported by the 1st defendant, and all the income was enjoyed by the 1st defendant. The plaintiff had to be maintained by his maternal relations and it is but fair that he should get his share of the income from the date of the plaint. The Court has a discretion in this matter and I think this is a fit case in which the discretion should be exercised in favour of the plaintiff by giving him a moiety of the income from the date of plaint to the date of his being put in possession of his share of the property.

Respondents 2 and 3 were not represented in this Court, but I must say in fairness to Mr. Rajah Aiyar that he presented his case very fairly before the Court.

The Memorandum of Objections is allowed with costs.

A. V. V. *Memo. of Objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Dronamraju Lakshmi Narasimha Rao Pantulu ... *Appellant** (*Plaintiff*)

v.

Immani Seshayya and others ... *Respondents* (*Defendants* 1, 2 *and* 4 *to* 8).

Narasimha Rao Pantulu *v.* Seshayya.

Transfer of Property Act, S. 60—Usufructuary mortgage—Term of 55 years fixed—Mortgagee to make certain payments annually to mortgagor, for beriz *etc.—Breach of contract—Suit for redemption prior to expiry of terms—If maintainable—Effect of breach of covenant—Equity—Accounting—Basis of—Expiry of term after decree but before appeal—Subsequent events—Appellate Court's powers to take notice of.*

Under the terms of two mortgage deeds of 1865, the mortgagee was put in possession and a term of 55 years was fixed therein. The rent payable was fixed at Rs. 240 per annum of which Rs 60 was to be paid to the mortgagor for expenses, Rs. 95 towards *beriz*, Rs 5 for village expenses and the balance of Rs 80 towards the liquidation of the debt, which was to be liquidated in the course of 55 years. The mortgagee made default in the payment of the annual sums to the mortgagor, and also the *beriz* and village expenses for several years. Before the expiry of the term fixed, a purchaser of the equity of redemption sued for redemption alleging that the mortgage debt had been discharged and that he was entitled to have an account taken of the rents and profits.

Held, (1) when a term is fixed in a usufructuary mortgage deed, and possession is given to the mortgagee with a stipulation that he is to pay himself interest and portions of principal out of the rents and profits, unless there is a clause in the mortgage deed itself enabling the mortgagor to redeem the mortgage at any time he chooses, the mortgagee is entitled to remain in possession till the close of the term. In such a case the term is equally for the benefit of the mortgagee as well as the mortgagor, and redemption cannot be asked for earlier ; (2) the failure to pay money annually to the mortgagor and towards *beriz* and village expenses amounted to a breach of contract, and it was not equitable that the mortgagee should be in a position to resist redemption when he himself did not comply with the other terms in the deed. In such a case, a Court of Equity ought to give relief to the mortgagor and allow him to redeem the property before the expiry of the term ; (3) as the mortgagee failed to pay the amounts which he had agreed to pay, he was bound to apply those amounts in reduction of the mortgage debt and the mortgagor was entitled to have an account taken of the rents and profits of the mortgaged premises ; and (4) the question whether the fact that the term of 55 years expired before the appeal was filed could be taken cognizance of the Appellate Court in determining the rights of parties need not be decided as it was unnecessary on the facts of the case.

Case-law discussed.

Second Appeal and Memorandum of Objections against the decree of the Court of the Additional Subordinate Judge

*S A No. 1216 of 1921. 26th September, 1924.

Narasimha Rao Pantulu *v.* Seshayya.

at Ellore in A. S. No. 255 of 1920 (A. S. No. 271 of 1920, Sub-Court, Ellore) preferred against the decree of the Court of the Additional District Munsif of Tanuku in O. S. No. 294 of 1918.

P. Somasundaram for appellant.

G. Lakshmanna for respondents.

The Court delivered the following

JUDGMENT :—One Venkatrayudu Pantulu mortgaged the plaint properties to one Venkanna by two deeds, Exs. A and B on the 2nd May, 1865. The equity of redemption was sold by the Court in execution of a money decree against the mortgagor and was purchased by the plaintiff. He has brought the suit for the redemption of the mortgage against the defendants who are the representatives of Venkanna alleging that the mortgage debt has been discharged and that he is entitled to have an account taken of the rents and profits of the mortgaged property. The District Munsif held that the plaintiff was not entitled to redeem the mortgage as the term of 55 years fixed in the mortgage deed had not expired and he gave a decree for a certain amount which under the mortgage the mortgagee undertook to pay to the mortgagor. The plaintiff appealed and the Subordinate Judge of Ellore dismissed the appeal. The plaintiff has preferred this Second Appeal.

The first contention is that he is entitled to redeem the mortgage before the expiry of the term as the term is only for his benefit. Mr. Somasundaram who appears for the appellant contends that the presumption is that the term fixed in the mortgage deed is always for the benefit of the mortgagor and that he is entitled to redeem the mortgage at any time he likes. When possession is given to the mortgagee and the mortgagee is asked to pay himself the interest on the mortgage amount from the rents and profits of the mortgaged property and when the rents and profits are liable to fluctuation, it cannot be said that the term fixed in the mortgage is only for the benefit of the mortgagor. In such a case the term is equally for the benefit of the mortgagee as well as the mortgagor. It is well settled that when a term is fixed in a usufructuary mortgage deed and possession is given to the mortgagee, unless there be a clause in the mortgage deed itself enabling the mortgagor to redeem the mortgage at any time he chooses, the mortgagee is entitled to remain in possession till the close of the term. Where the mortgagee is asked to pay himself the

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principal and interest out of the rents and profits of the mortgaged property, he is entitled to remain in possession till the mortgage debt is wiped off from the rents and profits of the property. The appellant relied upon the case reported in *Mashook Ameen Suzzada* v. *Marem Reddy* (1) as supporting his contention. The facts in that case, no doubt, are similar to the present. But what the learned Judges held in that case was that it was a mortgage and that the mortgagor was entitled to redeem the property. The case does not support the appellant's contention. In *Sri Raja Setrucherla Ramabhadraraju Bahadur* v. *Sri Raja Vairicherla Surianarayanaraju Bahadur* (2) it was held that "where the parties agree that possession of the property shall be transferred to a mortgage for a certain term it may be inferred that they intended that redemption should be postponed till the end of the term. But the creation of the term is by no means conclusive on this point." *Ankinedu* v. *Subbiah* (3) does not help the appellant. All that was held in that case was that a provision in the mortgage deed whereby the mortgagee is to remain in possession after the payment of the mortgage debt is unenforceable as it acts as a fetter upon the right to redeem. In *Muhammad Sher Khan* v. *Raja Seth Swami Dayal* (4) it was held that the provisions of S. 60 of the Transfer of Property Act were imperative and that the right of redemption cannot be taken away by any contract between the mortgagor and the mortgagee. Even an anamolous mortgage is subject to the provisions of S. 60.

The right of the mortgagor to redeem the mortgage is not disputed but the question is, when does the right to redeem accrue ? In *Bakhtawar Begam* v. *Husaini Khanum* (5) their Lordships of the Privy Council held : "Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right to redeem can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property." In *Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (6) Muthuswami Aiyar, J., and Wilkinson, J., held "Having re-

1. (1875) 8 M H C R 31. 2. I L R 2 M 314.
3. (1911) I L R 35 M 744 : 21 M L J 1010.
4. (1921) I L R 44 A 185 : 42 M L J 584.
5. (1914) I L R 36 A 195 at 199 : 26 M L J 474 (P C).
6. (1892) I L R 16 M 486 : 2 M L J 272.

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gard to Ss. 60 and 62 of the Transfer of Property Act the Legislature appears to have adopted the principle that in the absence of a stipulation to the contrary the presumption is that the right to redeem and the right to foreclose arise at the same time and that when a date is fixed for the payment of the mortgage debt and the mortgagee cannot foreclose earlier the mortgagor also cannot redeem before the appointed time" See also *Gunnam Dorayya* v. *Vadapalli Ayyamacharlu* (7) and *Aga Muhammad Ally Beg* v. *Venkatappayya* (8).

In Ex. A the term fixed is 50 years and Ex. B extends the term by 5 years. So the period during which the mortgagee was entitled to remain in possession is 55 years from 1865. There is no provision in either of the deeds for the mortgagor redeeming the property before the expiry of 50 years and the appellant therefore is not entitled to ask for redemption of the mortgage merely on the ground that he has the equity of redemption.

The next point urged by Mr. Somasundaram is that the mortgagee has been guilty of a breach of contract and therefore he is entitled to sue for redemption before the expiry of the term fixed in the mortgage deed. Under the contract evidenced by Ex.A it was agreed that the mortgagee should pay Rs. 60 to the mortgagor for his expenses, Rs. 95 towards *beriz* payable to the *circar,* and Rs. 5 for village expenses and should apply the balance of the income of the property, namely, Rs. 80 towards the liquidation of his debt, and the debt should be liquidated in the course of 55 years. It is contended by Mr. Somasundaram that the mortgagee failed to pay Rs. 60 to the mortgagor as agreed to by him and failed also for several years to pay the *beriz* of Rs. 95 and also the amount payable for village expenses and therefore there having been a breach of contract on the part of the mortgagee the plaintiff is entitled to redeem the mortgage. When the parties to a mortgage agree to certain terms it is the duty of both parties to adhere to the terms of the mortgage. In this case the mortgagee undertook to pay annually Rs. 60 to the mortgagor for his expenses and it is admitted that he did not pay this amount to him. The contention of Mr. Lakshmanna for the respondent is that the mortgagor was entitled to sue for Rs. 60 in case of default and he is not entitled to treat the non-payment of Rs. 60 or failure to pay Rs. 60 per

7. (1914) 27 M L J 295 at 298. 8. (1918) 35 M L J 287.

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annum as a breach of the contract between the parties and he relies upon the clause in the document "If the amount of Rs. 60 payable to me every year is not paid in any year you should relinquish a portion in proportion to the cist payable to me." He urges that it was open to the mortgagor to have asked the mortgagee to relinquish a portion of the land capable of yielding Rs. 60 and if the latter declined to do so the former should have brought a suit for the amount and he is not entitled to treat the default to pay Rs. 60 as a breach of the condition in the mortgage deed. I am unable to accept this contention. Where the mortgagee undertakes to pay out of the rents and profits of the land mortgaged to him a certain amount for the expenses of the mortgagor he is bound to carry out that term of the contract and when he undertakes to pay *beriz* on the land, his failure to pay it would amount to a breach of the contract as it would thereby expose the land to be attached and sold for arrears of *beriz*. In this case the mortgagee undertook to pay three different sums for three different purposes and he not having paid those sums as agreed to by him, I think it is equitable that he should not be allowed to insist upon one of the terms of the mortgage deed being given effect to when he himself gives a go-by to the other terms of the deed. The mortgagee remaining in possession for a number of years is in consideration of his not only applying a portion of the rents and profits towards his debt but also in consideration of his meeting certain demands which ought to be met out of the income of the property. In a case like this I think a Court of Equity ought to give relief to the mortgagor and allow him to redeem the property before the expiry of the term.

I am supported in this view by the observations of Richards, C. J. and Banerji, J. in *Chhotku Rai* v. *Baldeo Shukul*(9) : " We think that on equitable grounds the defendants not having performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of the period of 10 years." No doubt the facts in that case are not very similar to those of the present. There the mortgagees failed to discharge prior encumbrances which they had undertaken to discharge and they having been in possession of the mortgaged property, and in receipt of rents and profits thereof, allowed interest to accumulate in respect of the encumbrances. The learned Judges held that " if the mortgagees

9. (1912) I L R 34 A 659 at 662.

were allowed to remain in possession of the property over the full period of 10 years taking the profits the plaintiff will be without any proper or effectual remedy." The principle of the decision is applicable to the present case. Mr. Lakshmanna contends that the mortgagor should have enforced payment of the amount payable to him by a suit. I do not think that the mortgagor should have been driven to file a suit year after year for the recovery of the amount payable to him by the mortgagee, nor was he bound to pay *beriz* on the land year after year and bring a suit every year against the defendant for the amount paid by him. In order to show that both mortgagors and mortgagees should carry out the terms of the contract embodied in the mortgage deed I may refer to the case in *Seaton v. Twyford* (10). Sir James Bacon, V. C. observed as follows : "The mortgagor who stipulates that he shall have 5 years to pay the mortgage money must of necessity, whether it is expressed or not, undertake at the same time that if he fails to do that which is incumbent upon him during the period of 5 years to do, the restriction upon the mortgage shall thereupon cease." In India the non-payment of interest by the mortgagor to the mortgagee is not a sufficient ground for the mortgagee to bring a suit for sale before the expiry of the period fixed for payment of the principal but the decision shows that both parties should carry out the terms of the contract entered into by them.

If the mortgage amount has been paid off the right to redeem accrues, and if a suit for redemption is not brought within the statutory period it will be barred. The Privy Council held in *Bakhtawar Begam* v. *Husaini Khanum* (5) that a suit for redemption was barred inasmuch as it was alleged by the plaintiff that the mortgage debt became satisfied in 1838. The mortgagee not having paid the amount payable to the mortgagor was bound to apply that amount in reduction of the mortgage debt. When the mortgagee is in possession of funds arising from the rents and profits of the mortgaged premises he is entitled to pay himself first the interest on the mortgage amount and whatever remains over and above he is bound to apply towards the reduction of the capital. The mortgagee is not bound to accept the mortgage amount from the mortgagor if he tenders it before the expiry of the term. But where he is in possession of the mortgaged property and

5. (1914) I L R 36 A 195 : 26 M L J 474 (P C).

10. L R 11 Eq. Cases 591.

unless there is a stipulation that all the rents and profits should be applied towards interest, whatever remains over and above the interest due on the mortgage amount is bound to be applied towards the reduction of the principal. This is clear from *Thompson* v. *Hudson* (11). In that case Lord Romilly, M. R. held that when the mortgagees received a considerable sum of money by sale of a portion of the mortgaged property they were not entitled to charge interest on the whole of the principal amount mortgaged and keep the amount realised by sale in their hands. He held that that sum should have been applied in part payment of the mortgage amount. I may refer in this connection to an observation of Mr. Justice Mahmood in *Jaijit Rai* v. *Gobind Tiwari* (12) : " By a long course of decisions it has been settled in India that even a special agreement to the effect that the mortgagee shall remain in possession until the payment of the debt is made in one sum does not prevent the mortgage from being at an end whenever the mortgagee has realised both the principal and interest upon the usufruct. This rule, though it probably originated in the express provisions of the old Regulations, is so consonant with equity that it deserves recognition by the Courts even irrespective of statutory provisions."

It was next argued by Mr. Somasundaram that the term of 55 years expired in 1920 after the decree in the District Munsif's Court and before the appeal was filed in the District Court and he is therefore entitled to ask for an account. In the view I have taken of the right of the mortgagor to ask for redemption I do not think it is necessary to discuss this point in detail. In *Sri Rajah Setrucherla Ramachandra Raju* v. *Maharajah of Jeypore* (13) the learned Judges observe :—" It has been held in several cases that the Appellate Court can take cognizance of matters which happened after the institution of the suit for the purpose at any rate of moulding the relief which the plaintiff was entitled to. This will be done only in exceptional cases where it is necessary to prevent injustice or avoid multiplicity of proceedings." Mr. Lakshmanna relies upon *Ramanadhan Chetty* v.. *Pulikutti Servai* (14) and *Govinda* v. *Perumdevi* (15) and contends that what happened subsequent to the institution of the suit

11. L R 10 Eq. Cases 497. 12. (1884) I L R 6 A 303 at 308.
13. (1916) 1 M W N 354.
14. (1898) I L R 21 M 288 : 8 M L J 121.
15. (1888) I L R 12 M 136.

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should not be taken as a ground for giving relief to the plaintiff. In *Govinda* v. *Perumdevi* (15) the plaintiff sued for a declaration that a certain alienation made by a widow was invalid. Pending the appeal the widow died. He applied to amend the plaint by adding a prayer for possession. The Court held that it could not give permission to amend the plaint. In *Ramanadhan Chetty* v. *Pulikutti Servai* (14) the person who acquired the lessor's title brought a suit to eject certain trespassers from the leasehold property. Pending the appeal the term of the lease expired. He asked leave to amend the plaint pending the appeal by adding a prayer for possession. The Court held that such an amendment could not be granted. In the two cases there were two causes of action. The cause of action on which the suit was based was one and a different cause of action arose when the appeal was pending. But here the cause of action is the same, namely, the right of the plaintiff to redeem the mortgage. The plaintiff asks for redemption on the ground that the mortgage has been discharged and now the term having expired pending the appeal he relies upon that and says he is entitled to redeem. Possession of the mortgaged properties has been given to the plaintiff. So the question of redemption of the mortgaged properties is only of an academic interest. The real question is whether he is entitled to an account. It would not be right to drive the plaintiff to another suit for the purpose of taking an account on the ground that on the date of the suit the term of the mortgage had not expired. But as I have already held that the mortgagor was entitled to bring a suit on the date of the discharge of the mortgage amount, the contention of the respondent that the plaintiff is not entitled to rely upon what happened subsequent to the institution of the suit need not be considered.

The plaintiff is entitled to have an account taken of the rents and profits of the mortgaged premises. There is no question of limitation arising in the case. So long as the relationship of mortgagor and mortgagee subsists the mortgagee who is in possession of the mortgaged premises is bound to account for the rents and profits of the land. Vide *Parasurama Pattar* v. *Venkatachalam Pattar* (16). It was observed in that case :—" So long as the relationship of mortgagor and mortgagee continues, the obligation of the mortgagee to make

14. (1898) I L R 21 M 288 : 8 M L J 121.
15. (1888) I L R 12 M 136.
16. (1913) 25 M L J 561.

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there was a charge for criminal trespass in respect of these items by the predecessor-in-title of defendants 1, 2 and 5 against the vendors of the plaintiff and the matter ended in favour of the former (Ex. D, which was confirmed on appeal in 1908, Ex. IX). The present suit is filed in April, 1920 more than ten years after Exs. D and IX.

As to item 1, we agree with the Courts below that the suit is barred. Mr. T. Ramachandra Rao, who appeared for the appellant-plaintiff, contended that Art. 47 of Act XV of 1877 applied only to orders under Chapter XII of the Criminal Procedure Code of 1898 and not to an order under S. 522. The article refers to order under Chapter XL of the Criminal Procedure Code of 1872. Under S. 3 of the Code of 1898 all references to the old Code and its sections and chapters must be read as referring to the new Code and its corresponding sections and chapters. Chapter XL of the Code of 1872 corresponds to Chapter XII of the Code of 1898 partly and to S. 522 partly. There is no reason to confine the operation of Art. 47 to order under Chapter XII only. It is also contended that an order restoring possession under S. 522 is an order respecting the possession of property within the meaning of Art. 47. We do not see any force in this contention. The case in *Bolaichand Ghosal* v. *Samiruddin Mandal* (1) cannot help the appellant. In that case the right which was the basis of the suit did not exist at the time of the criminal proceedings and was not affected by the order in then proceedings. The appeal, therefore, fails as to item 1 and is dismissed with costs of respondents 1 and 5, the costs being proportionate to its value.

As to item 2 we are not able to agree with the view taken by the lower Courts. If defendants 1, 2 and 5 were the contesting defendants as to this item, the judgment would have been correct. But they disclaim all interest in the land. They at one time claimed as tenants of the Maharajah. But in Survey Proceedings, the Maharajah's title was found against and 3rd defendant was found to be an inamdar and the Maharajah submitted to the decision of the Survey Officers, and defendants 1, 2 and 5 have also acquiesced in that decision though the plaintiff does not.

Now we think that the plaintiff in suing the 3rd defendant has not got to set aside the order of 1908. The 3rd defend-

1. (1891) I L R 19 C 646.

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ant was not a party to that order ; nor did that order uphold *his* possession ; nor does the 3rd defendant claim under the party successful in the criminal dispute. We agree with the observations of Pontifex, J. in *Aukhil Chunder Chowdhury* v. *Mirza Delwar Hossein* (2). It is true that in that case, there is the additional fact that the order had been set aside. It is also true that Hill and Rampini, JJ. doubted the correctness of the decision of Pontifex, J., in *Jogendra Kishore Roy Chowdhury* v. *Brojendra Kishore Roy Chowdhury* (3) and referred the matter to a Full Bench. The Full Bench found it unnecessary to decide the *wider* question raised by Hill and Rampini, JJ., and held, in that case, that the suit was between the parties to the order and to that extent agreed with Pontifex, J. Whatever the exact interpretation of Pontifex, J.'s judgment we are of opinion that an order under S. 522 of the Code, 1898 can only be binding between the parties to the order and can have no finality in favour of one who is not a party and does not claim under a party. To give such an effect to it is to create a new species of orders *in rem* which is opposed to fundamental principles, and leads to grave anomalies in the working out of the article. We do not think that Devadoss, J. has taken a different view in Second Appeal No. 14 of 1922. The merits have not been gone into with regard to this item. The suit will have to be remanded so far as item 2 is concerned. Costs to abide result.

The appellant will have a refund of the proportionate part of the Court-fee.

T. S. V. ——— *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE SRINIVASA AIYANGAR.

Edmund Bendit and another ... *Appellants** (*Plaintiffs*)

v.

Edgar Raphael Prudhomme, a merchant carrying on business at No. 4, Errabalu Chetty Street, George Town, Madras, under the name and style of Hope Prudhomme Company ... *Respondents* (*Defendants*).

Edmund Bendit v. E. R. Prudhomme.

Contract Act, S. 56—Contract for sale of goods of a particular quality—C. I. F. terms—Shipment in specified season—Ship chartered by seller com-

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*O S A No. 80 of 1922. 2nd November, 1924.

2. (1880) 6 C L R 93. 3. (1896) I L R 23 C 731 (F B).

Edmund Bendit v. E. R. Prudhomme

mandeered by Government—War conditions—"Force majeure" clause—Impossibility of performance—Liability of seller.

On 10th November, 1916, the defendant, a merchant of Madras, agreed with the plaintiffs a firm in Marseilles, to ship 400 tons of groundnut to Marseilles in the ensuing December-January (1916-1917) season on a C. I. F. contract, the goods to be of a particular brand. The defendant had booked the necessary tonnage on the *S. S. Seapool* chartered by a local company but the vessel was commandeered by Government on 14th November, 1916, for purposes connected with the War. In spite of best endeavours, the defendant was unable to obtain accommodation for this cargo on any other steamer leaving the Coromandel Coast, as all the space on the steamers calling at Marseilles in December or January had already been booked before the commandeering of the *Seapool.* The contract between the parties contained a "*force majeure*" clause absolving the parties from the performance or further performance of the contract in case of war, revolution, strikes, epidemics or other unforeseen circumstances which might prevent the goods from being shipped or despatched. In a suit by the plaintiff for damages for defendant's failure to deliver the goods contracted to be sold, *held* that it was impossible for the defendant to get the tonnage to take the cargo to Marseilles during the contract period ; that the commandeering of the *Seapool* together with the absence of other shipping accommodation for the cargo constituted "*force majeure*" within the meaning of that expression in the contract ; and that the defendant was therefore not liable in damages for non-performance of the contract.

Meaning of the expression "*force majeure*" discussed.

The defendant could not have fulfilled the contract by buying groundnuts in the Marseilles or London market and supplying the plaintiffs for the contract was in respect of goods of a particular brand to be selected by the defendant and sold on C. I. F. terms, and the plaintiffs could not be compelled to accept goods not answering the description in the contract.

On Appeal from the judgment of the Hon'ble Mr. Justice Coutts-Trotter, dated the 28th August, 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 280 of 1921.

Vere Mockett for appellants.

The Advocate-General and *S. Guruswami Chetty* for respondents.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—The respondent, a merchant of Madras, contracted on 10th November, 1916, with the appellants, who are a firm in Marseilles, to ship 400 tons of groundnut kernels to Marseilles in the December-January 1916-1917 season on a C. I. F. contract, the goods to be of H. P. Brand. He booked the necessary tonnage on the *S. S. Seapool,* a vessel chartered by Messrs. Gordon, Woodroffe & Co., but it was commandeered by the Government on 14th November for purposes connected with the War. In spite of his best endeavours, the respondent was unable to

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obtain accommodation for this cargo on any other steamer leaving the "kernel" ports, that is, ports on the Coromandel Coast from which kernels are usually shipped, *viz.*, Madras, Pondicherry, Cuddalore, Negapatam and Porto Novo. He therefore wrote on 22nd December, 1916, and 11th January, 1917, to the appellants pleading *force majeure* and asking them to consider the contracts as cancelled. The appellants refused to do so, rejecting the plea that this was a case of *force majeure* and suggested trying other lines and other ports. The respondent tried all the shipping agents in vain. He then made a proposal that he should endeavour to work off old contracts by shipping a portion of the goods contracted for under old contracts along with the portions of the goods to be supplied under new contracts, but the appellants only treated this as a virtual admission of his liability and an attempt to diminish his debt. They were unwilling to accept the proposal exactly as it was offered and it fell through. There was no extension of the time for performance for an indefinite period by mutual agreement. In the end they put the respondent into Court in March, 1921, and lost their case in the Trial Court, on the findings of the Judge, (1) that *force majeure* would discharge the defendant from the performance of his original contract, and (2) that inability to obtain tonnage is *force majeure* within the meaning of that expression as construed in English Courts.

It may be noted in this connection that both the standard contract forms in use by the parties (Exs. A and I) contain *force majeure* clauses. Ex. I, which is respondent's version is the less definite of the two. It mentions two kinds of *force majeure* which would render the contract null and void except so far as it had already been partly performed. One is prohibition of export of the article from the country, a second is blockade, and there are others not mentioned. Such are cases of *force majeure* preventing the execution of the contract. Ex. A is more explicit, as it enumerates war, revolution, strikes, epidemics as well as other unforeseen circumstances which might prevent the goods from reaching the port of embarkation or from being shipped or despatched and so would render the contract void. S. 56 of the Indian Contract Act simply says that a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful becomes void when the act becomes impossible or unlawful; and S. 65

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Spencer, J.

provides that in such event any person who has received any advantage under the contract is bound to compensate the person from whom he received it.

The term *force majeure* which is borrowed from the Code Napoleon has received interpretation in several decisions of the English Courts in recent years. In *Matsoukis* v. *Priestman and Co.* (1) Mr. Justice Bailhache after considering the definition given by an eminent Belgian lawyer of *force majeure* as meaning " causes you cannot prevent and for which you are not responsible "—a definition which would certainly include inability to obtain tonnage owing to war conditions prevailing in the port or ports from which the goods were to be despatched—himself gave it a more restricted meaning. In his opinion *force majeure* would include strikes and breakdown of machinery but not bad weather, or football matches, or a funeral. In *Lebeaupin* v. *Crispin* (2) Mr. Justice McCardie observed :—" A *force majeure* clause should be construed in each case with a close attention to the words which precede or follow it, and with due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument. "

In *Peter Dixon and Sons, Ltd.* v. *Henderson Craig and Co., Ltd.* (3) the fact that British ships were no longer available by reason of the war for carriage of wood-pulp from Canada to Grimsby in England was held to be a hindrance to the performance of a contract for delivery of pulp and came within the meaning of the *force majeure* clause in the contract under consideration in that case. If the hindrance was insurmountable, it would amount to prevention, which was another term used in the contract which would relieve the sellers from liability, and the Court of Appeal held that the arbitrators were accordingly justified in finding the sellers not liable.

In the present case the matter is simplified by the fact that the expression " *force majeure* " does not stand alone, but the clause in which it occurs in Exs. A and I contains examples of what was intended to be conveyed by the term. War is one of the examples and the word *et cetera* at the end of the enumeration denotes that there are others.

In their letter (Ex. K) of January 18, 1917, the appellants admitted that, if shipment by the *Seapool* has been one of

1. (1915) 1 K B 681. 2. (1920) 2 K B 714. 3. (1919) 2 K B 778.

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the declared terms of the contract between them and the respondent, the latter would be exonerated by the fact of that steamer being subsequently requisitioned by the Government. What, however, they failed to appreciate was that the respondent was not asking to have the contract considered as cancelled merely on account of the *Seapool* being requisitioned, but that the combination of two circumstances, (1) the commandeering of the *Seapool* on which he had already booked accommodation for this consignment of groundnuts, (2) the total lack of any other ships with available accommodation not already booked up by earlier applicants, made it impossible for the respondent to fulfil his engagements under Exs. VII and VII (*a*) in the season December-January, 1916-1917.

It has been contended both in the trial Court and here that the respondent might have shipped this consignment of groundnuts on the *Jossiphoglu* or the *Khiva*, or the *Griqua*, or the *Voyazides*, or the *Locksley Hall*, or the *City of Florence* ; but the evidence on the point to which we have referred makes it clear that all the space on the steamers calling at Marseilles in December or January was already booked before the commandeering of the *Seapool* became known on November 14, and that the respondent could not have foreseen the fact that he would be prevented from sending the consignment by the ship in which he had booked space, and could not have made other arrangements ; also that if he could have booked space in a steamer leaving Madras after January, 1917, the consignment would not have reached the consignees within the contract time. On the facts I agree with the conclusion of the learned Judge who heard the evidence "that it was a physical impossibility for Mr. Prudhomme to get tonnage to take this cargo at any rate of freight however high during the contract period."

But on the *Voyazides*, the *Jossiphoglu* the respondent sent consignments of groundnuts to Chabriere Morel and Compoi of Marseilles on earlier contracts with those consignees. It is suggested by the appellants' counsel that the respondent might have kept his contract with the appellants by buying in these consignments or other consignments made by other merchants trading in groundnuts and diverting them to his consignees.

But it is not stated that any such consignments of groundnuts were sent except under previous contracts, and in *Tennants*

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(*Lancashire*), *Ltd.* v. *C. S. Wilson and Co., Ltd.* (4) it was observed by Lord Loreburn that it would not be reasonable to ask a person, who had entered into a particular contract to supply goods, to break his other contracts or to make others break their contracts in order to perform this contract. If a party to a contract could not perform his part without breaking other contracts, then the existence of those other contracts in the opinion of their Lordships might be deemed to hinder or prevent him from performing the contract in question. At considerable expense and loss the respondent might, it is suggested, have bought groundnuts in Marseilles itself and tendered them to appellants in performance of his contract, or he might have been sent this consignment to some port from which it might have been transhipped to Marseilles. But if he had adopted either of these courses he would still have been unable to make a good tender which the appellants would have been bound to accept, for the contract between the parties was a C. I. F. contract under which he had to tender bills of lading for 400 tons of groundnut kernels of H. P. Brand shipped by steamer from a kernel port to Marseilles. A tender of groundnuts of some other brand or of bills of lading from some other port such as Bombay or London would not have been a strict compliance with the terms of the contract such as appellants would have been bound to take up [vide *Hansson* v. *Hamel and Horley, Ltd.* (5).]

The fact which appears from the judgment in O. S. A. No. 73 of 1921 that in respect of the commandeering of this very steamer *Seapool* a French Court of Arbitration in regard to another contract held that the sellers could not successfully plead *force majeure* as a defence on the ground that goods of the proper month's shipment might have been bought up either on the high seas or locally in Marseilles, no doubt at a great advance in price, is immaterial for the decision of this appeal, because the details of that contract are not before us so as to enable us to judge of the correctness of the view taken by those arbitrators, and their decision is by no means binding upon us.

For these reasons I can come to no other conclusion than that the judgment appealed against is right and the appeal is therefore dismissed with costs.

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4. (1917) A C 495 at 510.

5. (1922) 2 A C. (H of L) 36.

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Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree that the appeal should be dismissed with costs. I wish only to add a few sentences with regard to the main contentions raised in the argument on behalf of the appellants. It seems to me really unnecessary to canvass for the purpose of this case the meaning or definition of *force majeure.* The only thing that was contended to amount to *force majeure* was the commandeering of the *Seapool* by the Government. I did not understand Mr. Mockett, the learned counsel for the appellants, in his argument to contend that such commandeering would not amount to *force majeure.* But in all such cases, it is not sufficient for the contracting party to point to something in the nature of a *force majeure* and seek to escape liability. It is absolutely necessary to go further and establish by satisfactory evidence that the circumstance or occurrence which is called *force majeure* was the real cause, which, to use the language of the contract in question, prevented the performance of the contract. Now, if the commandeering of the *Seapool* had taken place, say on the 30th or 31st of January, almost at the last moment, so as to upset all the calculations and arrangements of the defendant, there could possibly be no doubt that the *force majeure* would have been the immediate cause of the failure of the defendant to ship the goods and perform the contract. But the real difficulty in this case arose by reason of the *Seapool* having been commandeered as early as the 14th of November, whereas the shipments had to be in December-January. The defendant's plea, which was found by the learned Judge in the Court below to have been made good, was, that till the end of January the defendant made every effort to book the cargo and failed, not because the high rate of freight obtaining made his contract commercially impracticable but because he could not get tonnage for the cargo at any price whatever. It may almost seem from this finding that the real or immediate cause for Mr. Prudhomme not performing the contract was not the commandeering of the *Seapool* but his inability to procure tonnage in any vessel. No doubt this inability has been found as a fact by the learned Judge and has not been seriously assailed before us. But the inability to procure the necessary tonnage could not possibly be *force majeure* because the contract itself was during the war and the difficulty of securing space for cargo to be exported must have been in the contemplation of the contracting parties, and the difficulty or even the impossibility as it may

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be, of procuring tonnage was the result of the extraordinary competition prevailing at the time could not aptly be described by the expression *force majeure* however elastic and varying its connotation may be accepted to be. In these circumstances, unless the commandeering of the *Seapool* could be found to be the real or immediate cause of Mr. Prudhomme not performing the contrcat, the *force majeure* clause in the contract will not help him. After giving the matter my very careful consideration, I have come to the conclusion that in this case in spite of the interval of time between the 14th of November and the close of the period fixed for the performance of the contract, the commandeering of the *Seapool* was the real or immediate cause—cause, not in any scientific sense nor even in the language of ordinary parlance, but in a commercial sense. The fact was that Mr. Prudhomme, as a commercial man, made certain arrangements for shipping, entered into engagements for the purpose of procuring necessary tonnage and then entered into the suit contracts. Then suddenly on the 14th November he finds his plans are upset by the vessel being commandeered by which he had arranged to ship the goods. If thereafter he was able to obtain tonnage in any of the ships in such a manner as to enable him to fulfil the contract or indeed if he made no efforts at all to procure any such tonnage, the cause of his non-performance of the contract would not have been the commandeering of the *Seapool*. But it is a matter of common experience that what in ordinary circumstances would not have been the cause of any particular effect might become such cause when conjoined with certain other circumstances and then it is none the less the cause or effective cause, though not the sole cause. This was really what the learned Judge found. In this view any examination of the various cases with regard to the meaning of *force majeure* becomes unnecessary.

Two other arguments were addressed to us by Mr. Mockett, the learned counsel for the appellants. It was said that if Mr. Prudhomme was not able to obtain any tonnage in Madras or Pondicherry, there was no evidence that he could not have obtained such tonnage from any of the 'kernel' ports on the Coromandel Coast. This aspect of the contention would require him to establish conclusively a negative. It is significant that no evidence whatever has been adduced on behalf of the plaintiffs regarding the possibility of obtaining any such tonnage at any such port. The kind and quantity

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of evidence that would be required to establish a negative that nature would obviously vary according to circumstanc I have no doubt whatever that the learned Judge who arriv at the finding did so after a consideration of all those circu stances ; and the argument before us has failed to satisfy that that finding of fact has not been arrived at on proper sufficient material. Further, having regard to the fact th the inability to procure any tonnage after the commandeeri of the *Seapool* must be held to have been relied upon not in itself constituting *force majeure* but merely as a contributi cause to make the *force majeure* of the commandeering t effective cause of non-performance, I cannot help consideri that the nature and quantity of evidence required to establi the negative need not be so exhaustive or conclusive as m be required if what was relied upon was solely the impossibil of obtaining tonnage. In such circumstances I am prepar to hold that when a commercial man finds himself face to fa with an upsetting of his plans and calculations brought abo by *force majeure* he is not bound to prove more than that made his best endeavours as a man of ordinary prudence wou and should, who was anxious to procure some tonnage f himself in such circumstances.

This test at any rate on the evidence on the record behalf of the defendant, as accepted by the learned Judge, amply satisfied in the present case.

The third and last contention on behalf of the appellai was that the defendant finding that the *Seapool* was co mandeered and finding himself unable to procure any oth tonnage should still have performed the contract by purchasi at Marseilles goods of the description contracted for and su plying to the plaintiffs such goods on the documents relati to shipments thereof so as to carry out the contract.

To begin with, I must observe that this contention do not appear to have been submitted to the learned Judge the Court below. In the second place, it is perfectly cle that any purchase of similar goods in the market locally Marseilles and tendering them in performance of the contr would not have been performance according to the terms a the tenor of the contract and the buyers would have been titled to refuse to accept the same. I am not also sure w ther even the purchase of documents relating to Decemb January shipments of goods from the ports referred to wou

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have been proper performance ; because there is a stipulation in the contract as regards the brand "H. P." (Hope Prudhomme), and there is no evidence and no facts which would justify me in holding that this stipulation with regard to the brand did not include besides the mark "H. P." (Hope Prudhomme) an implied condition regarding selection of goods by Mr. Hope Prudhomme. There is no evidence whatever that such documents were available in Marseilles which, even if the defendant could have procured them at any price, were such as the plaintiffs would be bound to accept as in performance of the contract.

Mr. Mockett relied upon the case of *Greenway Brothers, Ltd.* v. *S. F. Jones and Co.* (6). But that was a case of an ordinary contract for sale and delivery of goods and what was held was that the omission to deliver was not due to war or any other cause referred to in the contract. If in a contract for sale and delivery of goods the manner of the performance of the contract is not indicated or included as necessarily being in the contemplation of parties, then it necessarily follows that difficulties or even impossibility in the performance of the contract in the manner contemplated by one of the contracting parties would be no excuse for non-performance. But if the manner of performance is really indicated in the contract, or otherwise comes to be included as a term in the contract, then the *force majeure* clause would apply to any case of *force majeure* preventing the performance of the contract in that manner.

On a consideration of the whole contract in this case I have no hesitation in coming to the conclusion that the manner of performance of the contract included a shipment of goods to be selected by the defendant.

I am further of the opinion that whenever the possibility of performance is referred to in commercial contracts, what must be considered and contemplated is the possibility in a commercially reasonable sense and not merely suppositious possibility.

It follows from these considerations that the contract between the parties was that the defendant should purchase and ship goods of the descriptions contracted for and that if the plaintiffs were minded to do so, they would have been entitled to refuse any goods or documents not so proceeding ; and it also follows that having regard to the manner in which,

6. 32 T L R 184.

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Srinivasa Aiyangar, J.

commercially speaking, the defendant was expected and required to perform the contract there was no obligation on his part to proceed to Marseilles and look out for goods or documents of the description which might possibly have satisfied the requirements of the contract.

The decision of the learned Judges therefore to the effect that the defendant had made good his defence is right, and the plaintiff's action was rightly dismissed.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* AND MR. JUSTICE SRINIVASA AIYANGAR.

P. K. Bhimasena Rao ... *Appellant** (*Deft.*)

v.

C. Venugopal Mudali and two others ... *Respondents* (*Plaintiff and defendants*).

Bhimasena Rao v. Venugopal Mudali.

Civil Procedure Code, O. 41, R. 22 (4)—Appeal dismissed for default—Memorandum of Objections—If can be heard—Original Side Appeals—Applicability of O. 41—Letters Patent, cl. 15—Memorandum in effect an appeal—Delay in filing—Party misled by rules of Court and practice—Limitation Act, S. 5.

An appellant who had been directed by Court to furnish security for costs of the respondent failed to do so and his appeal was dismissed for default. Meanwhile the respondent had filed a memorandum of objections. *Held,* the memorandum should still be heard and disposed of after notice to the parties.

O. 41 of the Civil Procedure Code has no application to appeals from the Original Side of the High Court. Such appeals are provided for by cl. 15 of the Letters Patent. In such a case, even if a respondent files a memorandum of cross-objections, it is apart from nomenclature an appeal and should be treated as a substantive appeal. Where by reason of the rules of Court and the practice prevailing for a long time a party files his appeal out of time, the provisions of S. 5, Limitation Act, can be invoked to excuse the delay.

Memorandum of Objections in Original Side Appeal No. 16 of 1922 presented against the judgment and decree of the Honourable Mr. Justice Phillips dated the 1st December, 1921, and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 662 of 1920.

T. K. Narasimha Aiyangar and *T. A. Vijiaraghavachariar* for appellant.

V. K. Venugopal Naidu and *V. Krishnan* for respondents.

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*O.S A No. 16 of 1922. 26th November, 1924.

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Srinivasa Aiyangar, J.

The Judgment of the Court as regards the preliminary point relating to the Memorandum of Objections was delivered by

Srinivasa Aiyangar, J. :—I shall only say a few words with regard to the preliminary objection that was taken to the hearing of the appeal by the learned vakil for the respondent. The third defendant originally filed an appeal and by an order of this Court he was directed to furnish security for the costs of the plaintiff-respondent. He failed to do so and in consequence the appeal went off for default. The objection taken by the learned vakil for the respondent is that in form the present appeal preferred by the first defendant was a memorandum of cross-objections such as is contemplated under R. 22, O. 41 of the Civil Procedure Code. His argument was that, when the appeal went off for default and there was no hearing of the appeal the memorandum of cross-objections could not be heard. ... assuming that O. 41 of the Civil Procedure Code applies to this case, the Legislature itself has provided for it in clause 4 of R. 22 of O. 41. Before this new Procedure Code there was an expression of judicial opinion to the effect that such cross-objections could not be heard if there was no hearing of the appeal itself. It is to provide against such contingencies that clause 4 provides that where, in any case in which any respondent has under this rule filed a memorandum of objections, and the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.Notice of the memorandum of objections has been served and therefore there is no valid objection to its being heard. But, in my opinion, O. 41 has no application whatever to appeals from the Original Side. The appeal is provided under clause 15 of the Letters Patent and it is not an appeal from one Subordinate Court to another, the appellate Court, but from one Judge of the same Court to two or more Judges of the same Court. Now, in such a case, the provision is only for an appeal from a judgment of one Judge. There is no doubt in the rules framed by this Court for Original Side appeals in R. 351, there is a reference to memorandum of objections, if any. The Law of Limitation provides 20 days for appeals from a judgment of one Judge on the Original Side and any provision for the filing of memorandum of objections by the rules of this Court will have no necessary effect of extending the period prescribed by the law of limitation for

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Original Side Appeals : but, in this case, apart from any question of limitation, there is absolutely no difficulty in treating what is called the memorandum of objections as a substantive appeal, because an appeal merely means a petition to the proper tribunal for the purpose of reversing or modifying a judgment of the Court or Judge from which or whom the appeal is preferred. This is that in form, and, apart from any nomenclature, there is absolutely no difficulty in dealing with the substance of this appeal and dealing with it as a substantive appeal. However, I think the appellant in this case should under the rules of this Court treating it as a substantive appeal be required to pay another sum of Rs. 75 as and for additional Court-fee. There is, however, the question of limitation, and, though this appeal was not filed within 20 days of the judgment appealed against, still there is no doubt whatever that the appellant in this case was misled by the rules of this Court and by the practice of this Court so long, and, therefore, if there is any case in which the provision of S. 5 of the Limitation Act can be invoked, this is such a case. The delay in the presentation of the appeal will therefore be excused, and the appeal is thus rendered competent. For the reasons set forth in his judgment by my Lord the Chief Justice I agree that the appeal should be allowed as stated by him.

T. S. V. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Lahore.)

PRESENT :—LORD BUCKMASTER, LORD DUNEDIN AND LORD SUMNER.

Rai Bahadur Lala Narsingh Das ... *Appellant**

v.

The Secretary of State for India in Council... *Respondent.*

P. C.

Lala Narsingh Das v. Secretary of State for India in Council.

Land Acquisition Act of 1894—Compensation—Decree of High Court awarding—Appeal to Privy Council from—Right of—Land Acquisition Amending Act of 1921, S. 26 (2)—Effect—Interference by Privy Council with judgments of Indian Courts as to valuation of property and similar questions—Principles of —Valuation of property compulsorily acquired—Measure of.

On an appeal by a person whose property had been acquired under the Land Acquisition Act against the decree of the High Court awarding him compensation, *held* that in such cases the Privy Council would not interfere with judgments of the Courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of

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*P C Appeal No. 40 of 1924, 5th December, 1924.

P. C.

Lala Narsingh Das v Secretary of State for India in Council.

the district might have an important bearing on the conclusion reached, unless there was something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment could not be supported as it stood, either by reason of a wrong application of principle, or because some important point in the evidence had been overlooked or misapplied.

The value of property compulsorily acquired is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired.

Under S. 26, sub-S. (2) of the Land Acquisition Amending Act of 1921 an appeal lies to His Majesty in Council from a decree of the High Court awarding compensation as from a decree in an ordinary suit.

Appeal from a decree of the High Court (27th April, 1922) which varied in the appellant's favour a decree of the District Judge of Lahore (15th April, 1919).

The land, measuring 4 kanals 15 marlas 120 sq. ft., which was the subject of the appeal, had been bought by the appellant in January, 1908, at the rate of Rs. 690 per kanal, but the sale deed was not registered till August 1915, when the price was raised to Rs. 889 per kanal. After a Government notification under S. 6 of the Land Acquisition Act (I of 1894), the Land Acquisition Officer of Lahore in March 1918 passed an order valuing the land at Rs. 2,000 per kanal, and accordingly awarding the appellant as compensation Rs. 10,986-5-4 [*i. e.*, Rs. 9,553-5-4 value of the land at Rs. 2,000 per kanal, and Rs. 1,433 being 15 per cent. addition thereto for compulsory acquisition under S. 23 (2) of the Act]. The appellant claimed to be compensated at the rate of Rs. 6,000 per kanal, *plus* the statutory 15 per cent. The Collector referred the claim for decision under S. 19 (2) of the Act to the District Judge of Lahore (N. H. Prenter, Esq.) who upheld the Land Acquisition Officer's award. Upon appeal, the High Court (Sir Shadi Lal, C. J. and Harrison, J.) increased the compensation to Rs. 2,400 per kanal, *plus* 15 per cent., thus making the total amount payable to the appellant Rs. 17,967-9-0. The appellant being dissatisfied appealed to His Majesty in Council.

L. de Gruyther, K. C. and *H. R. Majid* for appellant.

A. M. Dunne, K. C. and *W. Wallach* for respondent.

5th December, 1924. The Judgment of the Board was delivered by

Lord Buckmaster.

LORD BUCKMASTER :—The appellant is the owner of a plot of land having a frontage on the west side of Montgomery

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Road, Lahore. The Government of the Punjab, requiring this land for the purpose of a Police Post, duly notified the appellant on 7th July, 1917, that the land was so required and directed the Collector of the District to take steps for its acquisition. The price not being agreed a reference was taken to determine the value and an award was consequently made allowing the appellant at the rate of Rs. 2,000 per kanal for the land. The appellant refused to accept this award and the case was accordingly referred to the District Judge of Lahore who delivered judgment on the 15th April, 1919, affirming the award.

An appeal was thereupon laid to the High Court of Lahore, who varied the judgment of the District Judge in favour of the appellant and increased the allowance to about Rs. 3,000 per kanal. From this judgment the appellant has once more appealed to His Majesty in Council. The first comment to be made upon the appeal is this ; that before 1921 such an appeal would have been incompetent, as was decided in *Rangoon Botataung Company, Limited* v. *The Collector, Rangoon* (1), but the Land Acquisition Act, 1894, was amended in 1921 in the following way :

"*Section* 2.—S. 26 of the Land Acquisition Act, 1894 (hereinafter referred to as the said Act), shall be re-numbered 26 (1), and to the said section the following sub-section shall be added namely :—

"(2) Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of S. 2, cl. (2), and S. 2, cl. (9), respectively of the Code of Civil Procedure, 1908."

and it is under this section that the present appeal is maintained. The matter, therefore, must be considered and determined in the same manner as if it were a judgment from a decree in an ordinary suit, but it has been repeatedly laid down by the Board that in such cases they will not interfere with judgments of the Courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached, unless there is something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle, or because some important point in the evidence has been overlooked or misapplied.

1. (1912) L R 39 I A 197 : 23 M L J 276.

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Lala Narsingh Das v. Secretary of State for India in Council.

Lord Buckmaster

Now, the principle upon which valuation of property compulsorily acquired should be measured has been repeatedly laid down before by this Board and by the House of Lords. To use the words to be found in *Fraser and others* v. *City of Fraserville* (2),

"it is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired."

Their Lordships are unable to find that this principle has been departed from by the High Court in the judgment that they have formed. The learned Judges appear to have examined the cases of the sales of property in the district and rejected those which, from their different locality and the different possibilities of value due to their position, were, in their judgment, inapplicable, and to have dealt with this case by considering the value of the land immediately adjacent at the rear and excluded from the road as determined by actual sale then to have assumed that the land in dispute was added with the advantages of the frontage and thus to have fixed a value for the whole and then taken the fractional value of this sum represented by the ratio of the area of the land in question to the entire block and given to it the whole added value due to the frontage. Their Lordships see nothing wrong in the Court being thus guided to their conclusion, and the question as to the amount which they thought right to add for the advantageous position that the present property occupied, their Lordships are not prepared to examine.

For these reasons they think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

A small matter of the judgment was the omission of the right to interest to which the appellant is entitled at the rate of 6 per cent., as from the 7th July, 1917 when the land was acquired.

Solicitors for appellant : *Ranken, Ford and Chester.*
Solicitor for respondent : *Solicitor, India Office.*

A. de M. *Appeal dismissed.*

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2. (1917) A C 194.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Sivagami Ammal and another ... *Petitioners** (*Plaintiffs* 2 *and* 3)

v.

T. S. Gopalaswami Odayar and others ... *Respondents* (*Defendants.*)

Sivagami Ammal *v.* Gopalaswami Odayar.

Civil Procedure Code, O. 33, *R.* 9—*Suit instituted in* forma pauperis—*Death of plaintiff—Executor possessed of sufficient means to conduct the litigation—Liability to be dispaupered.*

Where the plaintiff who has instituted a suit in *forma pauperis* dies, it is open to his legal representative, in this instance an executrix, to continue the suit as a pauper even though such representative is not personally a pauper. The legal representative is not liable to be dispaupered because she is possessed of sufficient means apart from the assets of the deceased.

Quaere :—Whether a plaintiff, who is dispaupered pending suit, could be required to pay the Court-fee in respect of the plaint which has been by the order of Court admitted to be filed without any fee ?

Manaji v. *Khandoo Baloo,* I L R 36 B 279 dissented from. *Venkatanarasayya* v. *Achamma,* I L R 3 M 3 ; *In re, Mary Ann Bill* I L R 7 M 390 ; *Perumal Goundan* v. *The Thirumalarayapuram Nidhi, Ltd.,* I L R 41 M 624 referred to.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 2nd September, 1922, in I. A. No. 449 of 1922 in O. S. No. 56 of 1917 on its file.

K. Bhashyam and *K. S. Desikan* for petitioners.

A. V. Visvanatha Sastri for respondents.

The Court delivered the following

JUDGMENT :—The question raised in this Civil Revision Petition is of considerable importance. A suit for partition was allowed to be instituted by the plaintiff in *forma pauperis*. He died during the pendency of the suit leaving a will and appointing two of his sisters as executrixes. On their application to be brought on the record as legal representatives they were made plaintiffs 2 and 3 in the suit. One of the defendants in the suit would thereafter appear to have applied to the Lower Court under R. 9 of O. 33, Civil Procedure Code, to dispauper the plaintiffs so added as legal representatives and the learned Subordinate Judge directed that they should, as a condition precedent to continuing the suit, pay the institution fee in respect of the plaint on or before a date fixed by him.

*C R P No. 658 of 1922. 20th October, 1924.

Sivagami Ammal *v.* Gopalaswami Odayar.

Against that order this Civil Revision Petition has been preferred.

The questions that arise for determination are whether, when the plaintiff in a suit instituted in *forma pauperis* dies, his executor is liable to be dispaupered because personally he is not a pauper and whether he is also liable to be called upon at that stage to pay the Court-fees payable on the institution of the suit. The learned Judge in the Court below made the order following the judgment of Mr. Justice Davar in the case of *Manaji Rajuji* (*Rao Saheb*) v. *Khandoo Baloo* (1). It is true that that decision is a direct authority for the position. The learned vakil for the petitioners drew my attention to the statement at page 291 of the report of the judgment in that case where the learned Judge states that it was admitted before him that if the executor had come before the Court and asked to institute the suit in *forma pauperis* the application would necessarily have to be refused. I am unable to say why or how such an admission came to be made and how far the decision of the learned Judge was influenced by such admission. However that may be, I cannot regard the decision as correct. The real question is whether the expression 'plaintiff' in R. 9 of O. 33 of the Procedure Code when applied to the legal representative of a deceased pauper plaintiff refers to the physical person before the Court or the legal person in his representative capacity as the legal representative of the deceased pauper plaintiff. Under the General Clauses Act the word 'person' includes not only individual human beings but also companies or associations or bodies of individuals whether incorporated or not. As I understand the scheme of the Law of Procedure in this country, the word 'person' indicates a juridical person. In that view, it is possible that an individual human being might by reason of his possessing several juridical capacities be susceptible of possessing a number of juridical personalities. R. 4 of O. 7 of the Procedure Code is as follows : "Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it." R. 5 of O. 11 runs as follows : "No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless

1. (1911) I L R 36 B 279.

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the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator, or heir, or are such as he was entitled to or liable for, jointly with the deceased person whom he represents." These provisions would clearly seem to indicate that the person contemplated even by the Law of Procedure is the juridical person. To hold otherwise would obviously lead to serious and inconvenient consequences. If the trustee of a pauper trust should not be allowed to sue in *forma pauperis* because he has got private means, what about the converse case of a person himself a pauper but being possessed of sufficient means as the trustee of trust with plenty of money. Could it then be contended that because it is the same human individual that is possessed of sufficient means though in his capacity only as a trustee, he should not be allowed to sue as a pauper in respect of his own personal claims? The very expression 'legal representative' clearly indicates the representative character of the person brought on the record in the place of the deceased. From R. 3 of O. 22 it would seem that it is obligatory on the Court to allow the legal representative of the deceased plaintiff to come on the record and proceed with the suit. In R. 9 of O. 33 therefore if the expression 'plaintiff' should be construed as including the plaintiff's legal representative, then the means of the plaintiff can only be regarded as the means of the person who is the legal representative in his character as such legal representative.

In the case of *Bhagbut Doss* v. *Buloram Doss* (2) the learned Judges state as follows: "There was really no necessity for enquiry whether the applicant who claimed to be the representative of an admitted pauper was a pauper or not. No such provision is found in Chapter V of the Civil Procedure Code. The Court if satisfied that the appellant was the legal representative of the deceased ought to have admitted him to carry on the suit." Justice Davar in the Bombay case I have already referred to animadverts against this decision and states that he was unable to understand the reasoning of it. It seems to be that in that case the learned Judges only laid down that once a person is allowed to sue as a pauper and he dies, it follows necessarily that his legal representative is also a pauper in his character as such legal representative and that

2. (1865) 3 W R (Mis.) 20.

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therefore no inquiry is necessary or prescribed. Again in the case of *Venkatanarasayya* v. *Achamma*(3) Sir Charles Turner, Chief Justice, and Mr. Justice Kindersley held that the rule of English practice which prevents a minor from instituting a suit in *forma pauperis* through his next friend unless he gives proof not only that he is himself a pauper but that the next friend also is a pauper and that he cannot get any substantial person to act as his next friend, is not to be found in or deduced from the section of the Civil Procedure Code and that the minor may sue as a pauper by next friend who is not a pauper. The principle to be gathered from this decision is that regard must be had to the real juridical plaintiff in the case and not to the person who may be merely acting for the plaintiff.

Again in *In the matter of the Petition of Marry Ann Bill*(4), their Lordships Sir Charles Turner, C. J., and Mr. Justice Muthuswami Aiyar held that the Civil Procedure Code while it excepts certain cases does not exclude persons holding a fiduciary character from suing in *forma pauperis*, and in India, where it is difficult to procure administrators, it may have been thought inexpedient to introduce the English rule. This case has been explained by Mr. Justice Davar in his judgment already referred to on the ground that in that case the administratrix was herself a pauper. It may have been so. But nevertheless when the learned Judges refer to persons holding a fiduciary character, I believe they were really referring to persons holding a representative character ; and when the learned Judges refer to the difficulty of procuring administrators in India as the probable reason for the Indian Legislature having thought it inexpedient to introduce the English rule in India, it seems to me that they were referring not to any inducement to paupers to accept the administratorship but to the immunity granted to them for not being required to pay their own moneys for financing the litigation in respect of the estates they might undertake to represent.

In the case of *Perumal Goundan* v. *The Thirumalarayapuram Jananukula Dhanasekhara Sanga Nidhi, Ltd.* (5) Mr. Justice Kumaraswami Sastri delivering the judgment of the Court held that the liquidator of a company though not a pauper himself, may file a suit in *forma pauperis* on behalf of

3. (1881) I L R 3 M 3.
4. (1884) I L R 7 M 390.
5. (1917) I L R 41 M 624 : 34 M L J 421.

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a pauper company. In the course of his judgment the learned Judge referring to the case of *Manaji Rājuji* (*Rao Saheb*) v. *Khandoo Baloo* (1) and also the case of *In the matter of the will of Dawubai Haji Khan, Habib Khan* (6) says that they were cases of executors suing and the learned Judge expressly refrains from expressing any opinion as to the correctness of the decision.

The learned Subordinate Judge seems to have adopted the suggested distinction as final, overlooking altogether the intimation that the Court did not wish to express any opinion as to the correctness of Mr. Justice Davar's view in the Bombay case.

In *Mohammad Zaki* v. *The Municipal Board of Mainpuri* (7) Chief Justice Richards and Mr. Justice Banerjee held that while a person suing in *forma pauperis* becomes an insolvent, the Receiver in insolvency is entitled to continue the suit in *forma pauperis* as the insolvent might have done.

The learned vakil for the respondents referred to the case of *Farzand Ali Khan* v. *Mir Amir Haider* (8) for the position that leave to sue in *forma pauperis* is a personal right. Undoubtedly it is so. But the mere fact that it is a personal right is no reason for holding that his legal personal representative loses that right.

I consider that the Bombay case of *Manaji Rajuji* (*Rao Saheb*) v. *Khandoo Baloo* (1) has been wrongly decided and I prefer to follow the Madras cases already referred to by me and the undoubted principles underlying them. It may be that under R. 9 of O. 33 the legal representative of the deceased plaintiff is sometimes shown to have come into possession in his character as legal representative and out of the estate of the deceased of sufficient means within the meaning of cl. (*b*) ; then undoubtedly he too may be dispaupered even as the original plaintiff might have been.

The learned Subordinate Judge also refers to the fact that the two executrixes are also legatees under the will. It appears that there are other legatees as well. I do not, however, see the relevancy of the reference to the petitioners' executrixes being also legatees. It is not shown or sought to be argued that in their capacity as executrixes or legatees they are in possession of sufficient means. It follows therefore that the

1. (1911) I L R 36 B 279.
6. (1893) I L R 18 B 237.
7. (1918) 16 A L J 440.
8. (1914) 26 I C 714.

Syed Yusuf Saheb *v.* Subhan Bibi.

some relief in the suit. In cases where the plaintiff is not "clearly entitled" to some relief in the suit, English Courts have refused to make an order for advancement of income. [Vide *Rowley* v. *Burgess* (2).]. We should therefore ordinarily have to set aside an order of this kind made under no provision of law, but the appellant has in our presence consented to continue to pay the amount of Rs. 25 a month for two years from the date of the order, that is, till 15th October, 1925 without prejudice to any defence he may make in the suit and subject to the plaintiff furnishing security to the satisfaction of the Deputy Registrar on the Original Side within one month for the sum of Rs. 600. If the security is not furnished within one month as directed by us, the order will be vacated. If the suit is not decided by 15th October, 1925, the parties will be at liberty to apply to the Trial Court for a fresh order. Costs of this Appeal will be payable by the respondent to the appellant out of any decree that she may obtain as the result of the suit.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

T. Govindasamy Chettiar ... *Appellant** (*Plaintiff*)

v.

A. R. M. A. L. P. L. Palaniappa Chettiar ... *Respondent* (*Defendant.*)

Govindasamy Chettiar *v.* Palaniappa Chettiar.

Lease for term—Termination of—Breach by lessor of term of contract—Lessee's right to terminate lease on account of—Waiver of such right—Evidence of—Improper termination of lease by lessee—Lessor's right in case of—Duty on his part to mitigate damages—Right to sue for rent due under lease for remaining period—Transfer of Property Act, Ss. 108, 111.

A lease of a house for a term of five years provided, *inter alia,* that, within six months from its date (12-11-1916), the lessor "shall have a latrine constructed, a well sunk, and a room upstairs built." The lessee occupied the house up to 23rd February, 1919, and gave notice to the lessor on 3rd March, 1919, alleging that he vacated the house as the well was not sunk, and other necessary repairs were not effected.

In a suit by the lessor for the rent for the period 23-3-1919 to 15-9-20, *held* (1) that it was not open to the lessee to put an end to the lease on account of a breach of a term of the contract by the lessor ; (2) that, even if it was open to the lessee to so terminate the lease, he must be deemed to have waived

*S A No. 1516 of 1922. 13th November, 1924.

2. 2 W R 652 and Daniel's *Chancery Practice,* p. 863.

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his right, inasmuch as he continued to occupy the house after breach without giving notice of his willingness to extend the time for performance of the condition ; and (3) that the lessor was under a duty to mitigate the damages by taking tenants for rents they were willing to pay, and was not therefore entitled to the whole of the rent for the remaining period.

Damages decreed to the lessor.

Second Appeal against the decree of the District Court of Madura in A. S. No. 286 of 1923 preferred against the decree of the Court of the District Munsif of Madura Taluq at Madura in O. S. No. 44 of 1921 (O. S. No. 1143 of 1920 on the file of the Court of the District Munsif of Periyakulam).

T. L. Venkatrama Aiyar for appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—This Second Appeal arises out of a suit for damages for breach of contract of lease. The lease was of a house in Periyakulam and is dated 12th November, 1916 (Exs. 1 and A). It was executed by Subban Chetti, plaintiff's elder brother and it is not denied that plaintiff is the person now entitled to the house. The lease was for five years. One of the terms of the lease is that within six months from its date, the lessor "shall have a latrine constructed, a well sunk and a room upstairs built." The lessee occupied the house up to 23rd February, 1919 and a notice was given to the plaintiff on 3rd March, 1919 alleging that the defendant vacated the house as the well was not sunk and other necessary repairs were not effected. The plaintiff brought this suit for Rs. 521-12-9 being the rent for the period 23rd March, 1919 to 15th September, 1920. The District Munsif gave a decree but the District Judge reversed his decision and dismissed the suit.

Before me, Mr. T. L. Venkatrama Aiyar who has appeared for the appellant argued that the lessee for a term is not entitled to put an end to the lease for breach of covenants in the lease. He can only claim damages for such breach, if any. It is unnecessary to refer to the authorities cited by him. For the learned vakil for the respondent concedes that if there is a breach of mere covenants, the lessee is not entitled to put an end to the lease. [See *Surplice* v. *Farnsworth* (2)]. But the respondent contends that the term is a condition in the lease and not a covenant. He relies on Foa "Landlord and Tenant"

2. (1844) 7 M & G 576 (Woodfall, p. 213).

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pp. 312 and 313. But the distinction between a condition and covenant is made only when a lessor relies on the breach for putting an end to the lease. At p. 317 Foa says: "In no case can the lessee take advantage of the proviso for re-entry in order to avoid the lease, even where it is in the form that the term shall cease or that the lease shall be void for all purposes." Anyhow S. 111 of the Transfer of Property Act contains no clause providing for the termination of the lease at the option of the lessee on account of a breach of a term of the contract by the lessor similar to clause (*g*) providing for a forfeiture at the option of the lessor. I am, therefore, unable to agree with the District Judge, when he says: " It is further argued that the lease could only be avoided under the provisions of S. 108 of the Transfer of Property Act. Exhaustive as these provisions appear to be they do not say that a perfectly clear breach of contract is not a good ground for avoiding a lease." All that have to observe is that the Act does not provide for the termination of the lease for a term by the lessee on account of a breach by the lessor. Nor is there anything in section 108 to enable the lessee to avoid the lease.

But, assuming that the lessee is entitled to terminate the lease on account of the lessor's default in carrying out a term of the contract it seems to me that he has waived it. The lease provides for the construction of a well within six months, *i. e.*, 12th May, 1917. It is not pretended that the time was extended by mutual agreement or that the lessee, while condoning the breach on 13th May, 1917 gave notice to the lessor extending the term for performance of the term up to any later date. The lessee simply chose to continue to occupy the house till 23rd February, 1919, and then vacated it. It seems to me not open to the lessee to continue to occupy the house after breach, without giving notice that he was willing to extend the time for performance up to a specified date, and then throw up the lease on a date arbitrarily chosen by him. If he did not put an end to the lease on 12th May, 1917 it must be taken that he has waived the benefit of the condition (assuming there was one). In this view, the plaintiff is entitled to succeed.

I am not satisfied that plaintiff is entitled to the whole of the rent for the remaining period. In his deposition he says: " I asked many persons. They said the rent was high." It seems to me that he demanded higher rent than people were willing to pay and could get no tenant. I think it was his

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duty to mitigate damages by taking tenants for a smaller rent. The vakils, to avoid calling for a finding, left it to me to fix the damages. I have fixed it at half the suit amount and they have agreed to it.

The plaintiff will therefore have a decree for Rs. 260-14-4. The defendant will pay half the Court-fee in Second Appeal to plaintiff. Otherwise each party will bear his own costs throughout.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

The Bombay, Baroda and Central India Railway Co., Ltd. ... *Appellant** (*2nd defendant*)

v.

Nattaji Pratapachand Firm ... *Respondent* (*Plaintiff*).

The Bombay, Baroda and Central India Ry. Co., Ltd. v. Pratapachand Firm.

Railway—Carriage of goods—Loss—Risk-note Form B—Negligence—Onus of proof.

In a suit by a consignor against a Railway Company for damages for loss of goods agreed to be carried under the terms of a risk-note in Form B, the onus lies on the plaintiff to prove that the loss was due to theft or wilful neglect of the Company's servants. The Railway Company to whom the goods were delivered must give *prima facie* or formal evidence that as far as they know, the Company or their servants through whose hands the goods passed are not keeping back the goods, which is at least a possibility. For this purpose they should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disapperance of the consignor's goods. It is for the plaintiff, if he can, to prove by their cross-examination or by other evidence of his own, wilful neglect or theft by servants of the Railway.

G. I. P. Ry. v. *Himatlal,* 25 Bom L R 350 ; *Narayana Aiyar* v. *S. I. Ry. Co., Ltd.* 18 L W 322 ; *E I Ry. Co.* v. *Nathammal Behari Lal,* I L R 39 A 418 followed.

Second Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 148 of 1921, preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 166 of 1920.

Messrs. Moresby and *Taylor* for appellant.

L. A. Govindaraghava Aiyar for respondent.

The Court delivered the following

JUDGMENT :—Ten bales of yarn were consigned on behalf of the plaintiff at Sidhapur Railway Station on the

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*S. A No 1491 of 1922. 18th November, 1924.

The Bombay, Baroda and Central India Ry. Co., Ltd. *v.* Pratapachand Firm.

B. B. & C. I. Railway to Bezwada. Only nine bales were delivered at Bezwada. The suit is for the price of the missing bale. The plaintiff got a decree against the B. B. & C. I. Railway Co. and the Company files the Second Appeal.

The facts so far as they appear from D. W. 2 (which was accepted by the Courts below) may be stated. The wagon No. 7365 containing the ten bales passed through Dadar Junction (the Junction connecting the B. B. & C. I. Railway and the G. I. P. Railway) when it was checked and the goods found correct. From there the train passed *ex* Waribunder to Kalyan. There was shunting at Matunga on the way. The seals of the wagons were intact then. The train next stopped at Kurla for shunting. It also stopped at Ghalcooper, Thana and Mumbra. When the train got in motion at the Mumbra Station, the Guard (D. W. 2) noticed the doors of two wagons (7365 and another) open. But the train was not stopped. It next reached Kalyan where he reported the matter. D. W. 5 took up the matter and reported to the Assistant Station Master (D. W. 1) and the Shunting Master (D. W. 4). They got the wagon resealed and the wagon was shunted to the tranship shed. D. W. 3 checked the contents of the wagon and found one bale missing. As I understand the evidence of D. W. 2, there was nothing wrong with the wagon until the train left Mumbra Station.

The risk note (Ex. I) is in the Form B. Under it the Company is not liable except " for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively, for the carriage of the whole or any part of the said consignment provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident." The question of burden of proof was very much discussed before me. On this point I agree with the observations of Macleod, C. J. and Crump, J. in *G. I. P. Railway* v. *Himatlal* (1) :—" In this country a railway company should produce before the Court for examination those of their ser-

1. (1923) 25 Bom. L. R. 350.

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vants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods (at page 354)." "The onus lies upon the plaintiffs to prove that loss was due to theft by or to the wilful neglect of the Company's servants (at page 352)." See also *Narayana Aiyar* v. *S. I. Ry. Co., Ltd.* (2) and *E. I. Ry. Co.* v. *Nathmal Behari Lal* (3). There is often a difficulty in proving wilful neglect because the only evidence of wilful neglect is the evidence which can be extracted in cross-examination from the witnesses for the defence." [*B. B. and C. I. Ry.* v. *Dayaram* (4)]. This conclusion seems to be in accordance with common sense and sound principles of law. It is also in accordance with the conclusion in *Ghelabhai* v. *E. I. Ry. Co.* (5) and *E. I. Ry. Co.* v. *Kishan Lal Tirkha Mal* (6) and in *E. I. Ry. Co.* v. *Jogpet Singh* (7). I observe that the conclusion of Daniels, J. in *E. I. Ry. Co.* v. *Kishan Lal Tirkha Mal* (6) was arrived after relying on *Secretary of State for India in Council* v. *Jiwan Abdullah* (8), where Lindsay, J. held that the company is not liable if the case is one of deterioration of the goods and the plaintiff can recover for 'loss' only if they are lost by the railway administration and not following *Hill, Sawangers and Company* v. *Secretary of State* (9), and distinguishing *H. C. Smith* v. *Great Western Railway Company* (10). Similar reasoning about 'loss' was used by Page, J. in *E. I. Ry. Co.* v. *Jogpet Singh* (7). In the Bombay case *G. I. P. Ry.* v. *Himatlal* (1) the case of *H. C. Smith* v. *G. W. Ry. Co.* (10) was applied to risk notes in Form B. On the question as to whether plaintiff can recover only for goods lost by the company or recover for deterioration of goods, I agree with the decision of this Court in *M. and S. M. Ry. Co.* v. *Subba Rao* (11). But, I do not quite see how the question as to what kind of loss plaintiff can recover for, has any bearing on the question what the company must prove and what the plaintiff must prove. The case in *Ghelabhai* v. *E. I. Ry. Co., Ltd.* (5) rests on *Curran* v. *M. G. W. Ry. Co.* (12), the weight of which is somewhat shaken by *H. C. Smith* v. *G. W.*

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1. (1923) 25 Bom L R 350.
2. (1923) 18 L W 322.
3. (1917) I L R 39 All 418.
4. (1921) 23 Bom L R 583 at 585.
5. (1921) I L R 45 B 1201.
6. (1923) I L R 45 A 530.
7. (1924) I L R 51 C 615.
8. (1923) I L R 45 A 380.
9. (1921) 2 Lah. 133.
10. (1922) L R 1 A C 178.
11. (1919) I L R 43 M 617 : 38 M L J 360.
12. (1896) 2 I R 183.

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Ry. Co. (10). Possibly they are distinguishable. It seems to me that the company to whom the goods are delivered must give *prima facie* or formal evidence that, so far as they know, the company or their servants through whose hands the goods passed are not keeping back the goods, which is at least a possibility. [See *E. I. Ry. Co.* v. *Sukh Das Goverdhan* (13)]. For this purpose, they tender their servants for cross-examination and it is for the plaintiff, if he can, to prove by the cross-examination wilful neglect or theft by the railway servants.

In the present case I am glad to say that the conduct of the company is perfectly straightforward and they complied with the requisites of *G. I. P. Ry.* v. *Himatlal* (1) by examining D. Ws. 1 to 5. The plaintiffs have been able to elicit by the cross-examination of D. W. 2 that there was neglect of the Guard in not stopping the train. As the door was found open as soon as the train started, the bale would have been probably found on the line and there is little scope for 'theft in the running train.' I assume robbery in the Form B is equivalent to theft [*G. I. P. Ry. Co.* v. *Bhola Nath Debi Das* (14)]. The facts in *B. B. and C. I. Ry. Co.* v. *Dayaram* (4) are different. There it was found that a thief could enter either "while the train was standing there (Narbada Bridge Cabin) or while the train was approaching the Narbada Bridge and that it was pitch-dark night and the train would be going very slowly before reaching the station." Here the loss was in the morning before 9 A. M. and the probability of a thief stealing a bale of yarn is far less on the facts. The question is one of fact and as I think the inference of the Courts below is right, I accept their finding that the loss was due to the neglect of the Guard in not stopping immediately when he saw the doors open. Mr. Nambiar argued that this conduct does not amount to wilful neglect. In *Forder* v. *G. W. Ry. Co., Ltd.* (15) there was no neglect. The consignment of sheep skins was placed in truck of wood chips, but there was no notice to the company of the nature of the consignment. The case of *Joshua Buckton and Co.* v. *London and N. W. Ry.* (16) is also peculiar.

1. (1923) 25 Bom. L R 350.
4. (1921) 23 Bom. L R 583 at 586.
10. (1923) L R 1 A C 178.
13. (1923) 74 I C 431.
14. (1922) I L R 45 A 56.
15. (1905) 2 K B 532.
16. 87 L J K B 234.

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it was held that sending a wagon of three-ton capacity though asked to send a wagon of five-ton capacity on account of a mistake did not amount to wilful neglect. It was believed by the defendants' foreman that the wagon was a wagon of a capacity of five tons. It had originally been standing between two wagons of other railway companies which were five-ton wagons and it was believed to be of the same strength and I do not see how these cases can help the appellant. The case in *Wakbein* v. *L. and S. W. Ry.* (17) is a case of collision and *Pomfiet* v. *Lancashire and Yorkshire Ry.* (18) is a case under Workmen's Compensation Act. In *Grill* v. *General Iron Screw Collier Co.* (19) Willes, J. at page 612 said :—" Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. Gross, therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression 'gross negligence,' instead of the equivalent, 'a want of due care and skill.' " In *In re, Young and Harston's Contract* (20) Bowen, L. J. said :—" The term ' wilful default ' is not a term of art, and to pursue authorities with a view to defining for all time what is its meaning in a contract like this appears to me to press citation far beyond the point at which it ceases to be useful........ The other word which it is sought to define is ' wilful. ' That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in Courts of Law, implies nothing blameable, but merely that the person of whose action the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. " Similar remarks are used about 'wilfully neglecting' by Lord Coleridge, C. J. in *The Queen* v. *Downes* (21). I think wilful neglect has been proved in this case. I think on the facts the Courts below were right in thinking that the loss is probably due to it. It is not necessary to show that there is no other possible explanation for the loss. It is enough if " the facts proved strongly preponderated in favour of the theory "

17. 12 A C 41.
18. (1903) 2 K B 718.
19. L R 1 C P 600.
20. 31 Ch. D. 168 at 174.
21. 1 Q B D 25 at 30.

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which fixed the company with liability [*Central India Spinning and Weaving Co., Ltd.* v. *G. I. P. Ry.* (22)].

The Second Appeal fails and is dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Pechiayee ... *Petitioner* (Petitioner)*

v.

Vallaimuthu Velan ... *Respondent (Respondent)*

Pechiayee v. Vallaimuthu Velan.

Civil Procedure Code, O. 21, R. 89—Application to set aside sale—Application in writing or oral necessary—Deposit of required amount by itself not sufficient.

An application either in writing or oral is necessary before the Court can be called upon to act and set aside an execution sale under the provisions of O. 21, R. 89, Civil Procedure Code. Mere deposit in Court of the required amount within the period prescribed is not enough.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order dated 30th November, 1921 of the Court of the District Munsif of Madura Taluq and made in M. P. No. 450 of 1921 in E. P. No. 179 of 1921 in S. C. S. No. 623 of 1920 on the file of the Madura Sub-Court.

P. S. Narayanaswami Aiyar for petitioner.

B. Sitarama Rao and *S. R. Muthuswamy Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—I very much regret I cannot interfere with the order of the Lower Court in revision. The petitioner who was judgment-debtor paid the required amount according to the rules under the provisions of O. 21, R. 89, apparently with a view to enable her to apply for setting aside the sale under the terms of that section. But it is now clear that there was no application made by her to the Court either in writing or by parol. A few days after this the Court confirmed the sale, and more than 90 days thereafter the petitioner applied for a review of the order of confirmation. The Lower Court has held that the review petition was barred by limitation and dismissed it. Assuming that the Lower Court erred in its view of the law with regard to limitation to be applied to the

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*C R P No. 448 of 1922. 14th November, 1924.

22. (1921) I L R 47 B 155.

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review petition, I do not see what jurisdiction I have to interfere. However that may be, in view of the fact that no application was made by the petitioner to set aside the sale, I see no substance even in the application for the review and no use even if I should direct the Lower Court to consider the application of the petitioner for review of the order. Three learned Judges of this Court have held that an application either in writing or oral for setting aside the sale is necessary before the Court can be called upon to act and set aside the sale under the provisions of O. 21, R. 89. In the case of *Popooru Venkata Narasimha* v. *Jayanti Lakshmi Narasimham* (1) Sadasiva Aiyar and Moore, JJ. held that an application, oral or written, made within 30 days was necessary for the purpose of S. 310 (*a*) of the Civil Procedure Code corresponding to O. 21, R. 89. Mr. Justice Krishnan has also taken a similar view in the case of *Payapati Venkatasubba Rao* v. *Kalapatapu Narayana Rao* (2). The Bombay case in *Mathuji* v. *Kondaji* (3) has been expressly dissented from and refused to be followed by this Court. It is no doubt a hard case, but after all the provisions of the Procedure Code are meant to be observed ; and in view of the decisions of this Court I feel I cannot do anything to help the petitioner. The C. R. P. is accordingly dismissed, and I do not see why costs should not follow the event, and I accordingly award costs against the petitioner to the respondent.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Kothandarama Chettiar and another ... *Plaintiffs**

v.

Annamalai Pillai and another ... *Defendants.*

Kothandarama Chettiar v. Annamalai Pillai.

Civil Procedure Code, O. 38, R. 5—Small Cause Court—Powers of—Attachment of immoveable property before judgment.

A Court exercising the jurisdiction of a Small Cause Court has power to attach immoveable property before judgment under O. 38, R. 5, Civil Procedure Code. I L R 49 C 994 followed; I L R 46 C 717 ; 6 M H C R 91 explained.

Case stated under O. 46, R. 1, Civil Procedure Code, by the District Munsif of Ariyalur in S. C. S. No. 1258 of 1923.

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*R. C. No. 8 of 1923. 15th December, 1924.

1. (1916) 32 I C 783. 2. (1921) 62 I C 44. 3. (1905) 7 Bom. L. R. 263.

Kothandarama Chettiar v. Annamalai Pillai.

Devadoss, J.

The Government Pleader appeared as *amicus curiae* in the case.

The Judgment of the Court was delivered by

Devadoss, J. :—The question referred for the opinion of the High Court by the District Munsif of Ariyalur is whether a Court exercising the jurisdiction of a Small Cause Court has power to attach immoveable property before judgment under O. 38, R. 5 of the Civil Procedure Code.

The Civil Procedure Code of 1908 is made applicable to all Courts of Civil Judicature unless the whole or portions of it are declared not applicable to any Court or the jurisdiction of any Court. S. 7 enacts that certain provisions of the Civil Procedure Code shall not extend to Courts constituted under the Small Cause Courts Act, 1887, or to Courts exercising jurisdiction of the Court of Small Causes under that Act. Under O. 50 it is provided that certain provisions of the Civil Procedure Code shall not extend to Courts constituted under the Provincial Small Cause Courts Act, or to Courts exercising jurisdiction of the Court of Small Causes under that Act. O. 38 is not one of the orders mentioned in O. 50. O. 38 of the Civil Procedure Code is, therefore, applicable to the Court of Small Causes or Court exercising small cause jurisdiction. Under O. 38, a Court is empowered to attach before judgment moveable and immoveable property. It has also power to arrest the defendant before judgment, if proper cause is shown. So far as this Presidency is concerned, the jurisdiction of a Small Cause Court or a Court exercising small cause jurisdiction to attach before judgment moveable property and to arrest before judgment the defendant for proper cause shown, has never been questioned.

The question is whether under the present Code, the Court of Small Causes or a Court exercising small cause jurisdiction has power to attach before judgment immoveable property. According to the present Civil Procedure Code, O. 38 is applicable to all Courts, unless the jurisdiction under O. 38 has been specifically taken away by the Civil Procedure Code or any other enactment. There is nothing in the Civil Procedure Code of 1908 to show that O. 38, R. 5 is not applicable to a Court of Small Causes or Court exercising small cause jurisdiction. Under the Civil Procedure Code, 1882, the Small Cause Court was not given jurisdiction to attach immoveable property before judgment. Sch. II of that Code

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specifically took away the jurisdiction of the Court of Small Causes to attach immoveable property before judgment. It made Chapter XXXIV corresponding to O. 38 applicable to the Court of Small Causes with the reservation that it was not to apply to the attachment of immoveable property. Under S. 5 of the Code of 1882, only certain specified portions were made applicable to Courts of Small Causes constituted under Act XI of 1865 and to all other Courts except the Presidency Towns Small Cause Courts exercising the jurisdiction of a Court of Small Causes. There seems to be a distinct departure in the present Civil Procedure Code from the policy of the Code of 1882. Under the Code only certain specified portions of the Civil Procedure Code were made applicable to Small Cause Courts and Courts exercising small cause jurisdiction. The present Code is made applicable to all Courts of civil jurisdiction except such portions of the Code as are specifically stated to be not applicable to any Court or to the jurisdiction of any Court.

Where the terms of an enactment are quite clear, it is unnecessary to enquire into the reasons for the change. It cannot be suggested that the Legislature overlooked the provisions of the previous Code as to the jurisdiction of the Court of Small Causes or Courts exercising small cause jurisdiction as regards the attachment before judgment of immoveable property, when it enacted the present Code.

In the present Civil Procedure Code, the provision in Sch. II of the previous Code as regards the attachment before judgment of immoveable property by Courts of Small Causes is deliberately omitted. When the terms of an enactment are quite clear, it is not proper for the Courts to consider what the previous law on the subject was in order to interpret the existing law. Where it is doubtful as to what the Legislature meant by a certain provision of a new enactment, the Court could refer to the previous state of the law in order to interpret what is not clear. But where the law is clear, it is not proper for the Court to consider whether there has been a change in the policy of the law or whether there the Legislature overlooked the previous law on the subject [vide *Bank of England* v. *Vagliano* (1)].

This point has been decided quite recently by the Calcutta High Court on a reference similar to the present one. In

1. (1891) A C 107.

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Kedarnath Paramanik v. *Hem Nath Karamkar*(2), a Bench of the Calcutta High Court held that the Provincial Small Cause Court had power to attach immoveable property before judgment. The learned Judges referred to a previous case decided by them as regards the power of the Small Cause Court to attach moveable property before judgment. In *Kumud Behary Pal* v. *Hari Charan Sardar* (3) the same learned Judges held that the Court of Small Causes had power to attach moveable property before judgment. In that case, the District Munsif who referred the question was of opinion that a Small Cause Court had no power to pass interlocutory orders under S. 94 of the Civil Procedure Code and that an attachment before judgment was an interlocutory order and therefore such an order could not be passed by the Court of Small Causes. S. 7 (*b*) does not extend Ss. 94 and 95 so far as they relate to injunctions and interlocutory orders. If the intention of the Legislature was not to extend Ss. 94 and 95, it could have said so. But only certain orders under Ss. 94 and 95, *i. e.*, orders coming under S. 94 (*c*) and (*d*) are exempted from the jurisdiction of the Small Cause Court or Court exercising small cause jurisdiction. That is no reason for saying that the powers given by S. 94 (*a*), (*b*) or (*d*) could not be exercised by a Court of Small Causes. So far as our Presidency is concerned, as I have already observed, the jurisdiction of the Small Cause Court to attach moveable property before judgment and to arrest the defendants before judgment for proper cause shown, was never questioned.

In the case of *Ibrahim Rowthan* v. *Sangaram Shetty* (4) the power of the Small Cause Court to award compensation under S. 491 of the old Code corresponding to S. 95 of the present Code was recognised. The Calcutta High Court in this respect has come into line with the Madras High Court.

The District Munsif refers to an old case in *Marthamma* v. *Kittu Sheregara* (5) in which it was held on a reference by the Principal Sadr Amin of Mangalore that a Small Cause Court had no jurisdiction to attach immoveable property before judgment. The reason given by the learned Judges is that " the Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it. "

2. (1922) I L R 49 C 994. 3. (1918) I L R 46 C 717.
4. (1902) I L R 26 M 504. 5. (1871) 6 M H C R 91.

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With due respect to the learned Judges, it is not easy to follow the reasoning. The attachment before judgment is only a preventive remedy so as to enable the plaintiff to reap the fruits of his decree if he is able to obtain one, by preventing the defendants from making away with the property and thereby rendering the decree nugatory. It does not follow that a Court which has the power to attach immoveable property before judgment should necessarily have the power to execute the decree against immoveable property ; for the attachment before judgment is not in execution of its decree, but for preventing the defendants from making away with the property before the Court passes its decree. If the suit is dismissed the attachment will *ipso facto* cease. The decision in *Marthamma* v. *Kittu Sheregara* (5) cannot be said to be wrong in the state of the law as it then was. Under S. 5 of Act X of 1877 certain chapters and sections of the Code specified in the Second Schedule thereto annexed were extended to Courts of Small Causes constituted under Act XI of 1865. It was specially enacted in that section that " Nothing herein contained shall be deemed to enlarge the powers which such Courts now possess for the purpose of effecting attachments or executing decrees. " By S. 5, the Small Cause Court was not given additional or enlarged powers by reason of the Code of 1877, *i. e.,* the powers which such Court had not before the Act of 1877 was passed. By the Amending Act XII of 1879, the third sentence of S. 7 was repealed. The Second Schedule was amended by the insertion of the words " except as regards immoveable property. " This amendment was embodied in the Act of 1872 which put the matter beyond doubt. In 1871 when the decision in *Marthamma* v. *Kittu Sheregara* (5) was passed, the Court of Small Causes had no power to execute its decree against immoveable property. By Act XI of 1865, S. 20, it was provided that for the purpose of executing a small cause decree an application had to be made to the Court exercising general jurisdiction in which the immoveable property was situate. There is nothing in Act XI of 1865 to show that a Small Cause Court could attach before judgment immoveable property. Under Act VIII of 1859 a Civil Court had jurisdiction to attach before judgment both immoveable and moveable property (*vide* S. 83). S. 388 of that Code extended the Act to all Civil Courts but there is nothing

5. (1871) 6 M H C R 91.

Kothandarama Chettiar v. Annamalai Pillai.

Devadoss, J.

in the Act itself to show that the Act was extended to Small Cause Courts or Courts exercising small cause jurisdiction. Under the Small Cause Courts Act of 1865, therefore, the Small Cause Court had no jurisdiction to attach immoveable property. The decision in *Marthamma* v. *Kutti Sheregara* (5) is, therefore, correct with regard to the law as it then stood.

But as the law stands at present, it cannot be said that the Small Cause Court has no jurisdiction to attach before judgment immoveable property. As we have already observed, the present Code is quite clear on the point and therefore the decision in *Marthamma* v. *Kutti Sheregara* (5) cannot apply to the present state of the law.

We, therefore, answer the question referred to us in the affirmative.

We are very much indebted to the learned Government Pleader for assisting us by arguing the point fully as *amicus curiae*.

T. S. V. *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Adinarayana and others ... *Appellants** (*Defts. Nos.* 1, 5, 6, 2, 3 *and* 4)

v.

Kalamalla Venkatasubbayya ... *Respondent* (*Plaintiff*).

Adinarayana v. Venkatasubbayya.

Ejectment suit—Onus on plaintiff—Government patta—Plaintiff's title based on—Defendants denyig Government's right to issue patta and claiming title in themselves—Effect—Long possession of defendants—If prima facie *evidence of their title.*

Plaintiff, who had obtained a patta from Government in respect of a house-site, sued to eject the defendants from the same. The defendants, who had objected even at the time of the grant by Government, pleaded that the suit site had been in the possession of themselves and their ancestors for a long time, that the plaintiff could obtain no title to the suit site by the mere fact that Government had issued patta in respect of the same and they (defendants) had not trespassed upon the site recently, and that a penalty levied upon them by the Tahsildar for encroachment had been cancelled upon appeal.

Held, that in such a suit the onus was on the plaintiff to make out the title of Government at the time of the grant, and not upon the defendants to

*S A No. 1709 of 1922. 31st October, 1924.

5. (1871) 6 M H C R 91.

Adinarayana v Venkatasubbayya.

make out a prescriptive title against Government, and that the defendants' occupation for a long time itself was *prima facie* evidence of their title.

Second Appeal against the decree of the District Court of Anantapur in A. S. No. 71 of 1921 preferred against the decree of the Court of the District Munsif of Anantapur in O. S. No. 48 of 1920 (O. S. No. 710 of 1919 on the file of the District Munsif of Penukonda.)

V. S. Narasimhachar for appellants.

Krishna Arya and *Veeraraghavalu* for respondent.

The Court delivered the following

JUDGMENT :—The defendants 1, 5 and 6 are the appellants in this case. The suit was brought by the plaintiff to eject the defendants from a house-site. The plaintiff obtained a patta from Government on the 29th March, 1917. Even at the time of the grant by Government, the defendants objected. The plaintiff went to a Criminal Court which dismissed the complaint on the ground that it is of a civil nature. The defendants pleaded that the suit site had been in the possession of themselves and their ancestors for a long time and the plaintiff could obtain no title to the suit land by the mere fact that Government issued patta in respect of that and that they did not trespass upon it recently. They also pleaded that a penalty was levied upon them by the Tahsildar for encroachment and that on appeal that encroachment fee was cancelled. The second issue in the case runs as follows :— Whether the said grant is not binding on the defendants : whether the site belonged to them ? In my opinion this issue is not properly framed. Merely because Government have issued a patta to somebody, there is no presumption that Government are entitled to the land of which they purported to make a grant, and it is always for the grantee to make out that the grantor, Government in this case, has any title. The second issue should have run as follows : Whether the said grant binds the defendants and whether the plaintiff is entitled to the suit site ? The only difference in the frame of the issue is the change in the burden of proof. The onus lies on the plaintiff and not on the defendant. The District Munsif, however, found on this issue that the defendant and their ancestors had been enjoying the suit site for a long time and found the issue against the plaintiff and in favour of the defendants. On appeal the learned District Judge finds that the defendants have not made out a prescriptive title against Government.

This finding assumes that the title of Government is either made out or admitted, but the title of Government has never been admitted or has never been made out in the case. The learned District Judge is no doubt right in saying that, as the issue stood, the burden of proof is on the defendants. But, as already pointed out, the issue is not properly framed, but it ought to be framed so as to throw the burden of proof on the plaintiff.

I therefore set aside the judgment of the District Judge and remand the suit for disposal according to law. The Lower Appellate Court will now find if the plaintiff has made out the title of Government at the time of grant. Only if such a title is made out, the plaintiff would get any title under the issue of patta by Government. It must be remembered that the defendants were in occupation for a long time and that itself is *prima facie* evidence of their title ; but, even if they have no title to the suit land, the plaintiff cannot succeed in this suit before making out the title of his grantor. Now that the form of the issue is changed, I think it ought to be open to both parties to adduce fresh evidence. The District Judge might either take it himself or direct the District Munsif to record the evidence and send it up.

The appellant will get a refund of the Court-fee paid for this appeal. Costs of this appeal will abide the result.

A. S. V. *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

P. K. P. S. Sivanadian Chettiar ... *Appellant** (*Plaintiff*)

v.

Batchu Surayya and others ... *Respondents* (*Defts.*)

Shipping—Charterparty—Construction—Advance freight—What is—Suit for refund—If lies—Vessel stranded before voyage or loading cargo—Effect—Impossibility of performance—Contract Act S. 65—Substitution of ship—When allowed.

A contract of charterparty was entered into for two voyages with cargo from Akyab to Jaffna, and contained the following clauses relating to freights:—

"Payments of freight at the above rates to be made as —

1. Rs 6,600 advance on acceptance of the charterparty paid by charterers' representative subject to deduction of Rs. 3,300 per trip in loading.

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*Appeal No. 138 of 1922. 4th December, 1924.

Sivanadian Chettiar v. Batchu Surayya.

2. Rs 3,300 to be paid in Akyab per each trip in the time of lading.

3. The balance freight as the vessel reaches her destination and lands the cargo.

The amount agreed upon was paid, but the vessel was stranded on the way to Akyab to load cargo and the contract was not performed. The charterer sued for refund of the amount paid. *Held,* on a construction of the charterparty, the amount paid was a pure advance made to the shipowner on account of what would be payable as freight and the idea was that half of it was to be notionally distributed at Akyab on each trip at the time of loading cargo there, and as it was not "advance freight" as known to English Law, the same was recoverable by suit.

Per Phillips, J.:—The expression "advance freight" must connote "freight" and the idea of freight cannot arise until the voyage has actually begun or the goods for which freight is payable have been loaded or accepted by bills of lading. As the contract of charterparty became impossible of performance, the money could be recovered under S. 65 of the Contract Act if the Act applied to the case. The question whether the Indian Contract Act would apply to the case was however left open.

Per Odgers, J. :—A shipowner is entitled to compel the acceptance of a substituted ship, only after the voyage in the ship contracted for has actually begun.

The English doctrine relating to "advance freight" explained with reference to case-law.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in O. S. No. 21 of 1920.

K. V. Krishnaswami Aiyar and *N. S. Rangaswami Aiyangar* for appellant.

P. Somasundaram for respondents.

The Court delivered the following

Phillips, J.

JUDGMENTS :—*Phillips, J.* :—I agree. I am quite clear that neither under the contract Ex. A, nor under the doctrine of English Law can the Rs. 6,600 advanced be treated as "advance freight." "Advance freight" must connote freight, and it is clear from the authorities referred to by my learned brother that the idea of freight does not arise until the voyage has actually begun, or at any rate until the goods for which freight is payable have been loaded on the ship or accepted by bills of lading. In this case the ship has never been loaded nor was it attempted to be loaded and, consequently, there can be no question of freight. Even if the provisions of the Indian Contract Act are applied to this case, (it is unnecessary to decide this point which has not been argued before us) the plaintiff must succeed under the provisions of S. 65, because the contract has become impossible of performance.

Odgers, J.

Odgers, J. :—This was a suit for the recovery of a sum of Rs. 6,600 payable on a contract of charterparty (Ex. A)

entered into between the plaintiff and defendants. The Subordinate Judge has held that by the terms of Ex. A this sum was in fact paid by the plaintiff as "advance freight" which is, by a doctrine peculiar to the English Law, irrecoverable; how this occurs is explained by Brett, J., in *Allison* v. *Bristol Marine Insurance Co.* (1). The plaintiff has appealed. Ex. A after clauses contracting for two voyages of the defendants' barque *Bhagyalakshmi* from Akyab to Jaffna proceeds, "Payment of freight at the above rates to be made as:—

1. Rs. 6,600 (Rupees six thousand and six hundred only) advance on acceptance of the charterparty paid by charters' representative Sabapathi Chettiar at Cocanada, subject to deduction of Rs. 3,300 per trip in loading.

2. Rs. 3,300 to be paid in Akyab per each trip in the time of lading.

3. The balance freight as the vessel reaches her destination and lands the cargo."

Thus the whole sum of Rs. 6,600 was payable on signing Ex. A, but half of it was to be notionally distributed at Akyab on each trip *at the time of loading there.* Ex. A was made on 9th October, 1919, the first voyage was to be in January, 1920 and the second February-March, 1920.

The money was paid but no voyage was made according to the charterparty by the *Bhagyalakshmi* as she stranded on the Nellore coast while proceeding to Akyab to load for her first voyage.

The question is whether this sum of Rs. 6,600 is advance freight. In Leake on *Contracts* (7th Edition), page 73, the doctrine as to advance freight is said to be an example of money paid for an executed consideration if it was in fact the consideration bargained for and cannot be recovered back merely on the ground that it proved to be of no value. The learned author says, "Upon this principle freight paid in advance cannot be recovered back after the voyage has commenced, though the goods are lost during the voyage; for it is the uniform though perhaps anomalous rule that the money to be paid in advance of freight must be paid, though the goods are before payment lost by perils of the sea." The words to be noted here are 'after the voyage has commenced.'

In *Weir and Co.* v. *Girvin and Co.* (2), Vaughan Williams, L. J. at page 52 refers to the old view that advance

1. 1 A C 209 at 226. 2. (1900) 1 Q B 45.

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Odgers, J.

freight was different from freight and meant a loan or a sum payable when goods were put on board, in consideration of their being received on board. The opinions of the Law Lords in *Allison* v. *Bristol Marine Insurance Co.* (1) make it clear that "freight whether used in respect of advanced freight or otherwise always has the same meaning : the practical difference between advanced freight and freight is a difference arising from the stipulations which are made as to payment." Lord Esher, M. R. in *Smith Hill and Co.* v. *Pyman Bell and Co.* (3) says : "Now there are two peculiarities of the English Law as regards freight : first, that if part of the freight is advanced and the ship is lost, or the goods are lost, the part so advanced, although really not due under the terms of the contract unless there has been delivery of the goods, nevertheless cannot be recovered back by the charterer from the shipowner ; and secondly, that if there is no stipulation to the contrary, but only a stipulation that there shall be advance freight, it is payable at the moment of starting and even if not paid can be recovered by the shipowner from the charterer upon the loss of the ship." Advance freight is then payable "at the moment of starting" or in other words the ship must sail, unless there is some special contract to the contrary. As against this Mr. Somasundaram for respondents relies on *A. Coker and Co.,Ltd.*v.*Limerick Steamship Co., Ltd.* (4) where freight was on the contract payable in Liverpool before sailing on signing the bills of lading. Some of the Bills were signed and the House of Lords held that under the agreement a proportional part of the advance freight became payable on the signing of each bill of lading. The question turned on the construction of the charterparty. In the present case no cargo was loaded and no bills of lading signed. The case in the House of Lords can have no bearing on it. It appears to me therefore that the present payment of Rs. 6,600 can in no sense be viewed as advance freight. It was a pure advance made to the defendants on account of what would be payable to them as freight by the plaintiff but the conditions precedent, *viz.*, the starting of the voyage or at least of loading were absent to make it amount in law to advance freight. The wording of cls. (1) and (2) above proves this and there are no special clauses, *e. g.* as to freight being payable on signing bills of lading.

1. 1 A C 209. 3. (1891) 1 Q B 742 at 744. 4. 118 L T 726.

Sivanadian Chettiar v. Batchu Surayya. Odgers, J

A faint attempt was made to argue that the defendants were competent to substitute another vessel, the *Mahalakshmi* for the *Bhagyalakshmi* and were entitled to compel the plaintiff to accept her. The documents show that some such proposal was made. The Subordinate Judge has held that it never got beyond the stage of proposal and that plaintiff never consented to the substitution. The authority of Carver on *Carriage by Sea* (Art. 304) clearly shows that a shipowner is only entitled to compel the acceptance of a substituted ship after the voyage in the ship contracted for has begun, which is not the case here. The appeal must be allowed with costs throughout ; interest will be calculated at six per cent. from date of plaint.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Linga Reddi ... *Petitioner** (*Petitioner*)

v.

M. Chengalraya Reddi and others ... *Respondents* (*Respondents*).

Linga Reddi v. Chengalraya Reddi.

Hindu Law—Partition—Father and minor sons—Compromise of suit—Competency of father to act as next friend of minors.

In a suit for partition among the members of a joint Hindu family it is competent to the father to act as guardian or next friend of his minor sons and it cannot be said that his interests are adverse to those of the minors.

Petition under S. 115 of Act V of 1908 and under S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Sholinghur, dated 18th January, 1922 on I. A. No. 551 of 1921 in O. S. No. 85 of 1921.

V. C. Seshachariar and *K. V. Sesha Aiyangar* for petitioner.

V. S. Govindachari for respondents.

The Court delivered the following

JUDGMENT :—In this case a suit had been brought by a member of a Hindu family on behalf of himself and his minor son for partition against his co-parceners ; but, before the suit was ripe for hearing, matters were compromised between the plaintiffs and defendants and an application was made by the

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*C R P No. 526 of 1922. 28th November, 1924.

Linga Reddi v. Chengalraya Reddi.

defendants to have the compromise recorded in Court and a decree passed in its terms. The question necessarily arose before the Munsif as to whether the compromise was beneficial to the minor or not, for, before the compromise can be enforced, when a minor is involved in the matter, the sanction of the Court is necessary. In the meanwhile, an application was made by the minor's maternal grandfather to have the father removed from his place as next friend of the minor and himself substituted in that position. That petition was also heard by the Munsif along with the petition to record the compromise. Some other petitions were also filed, but it is not necessary to refer to them at present. The Munsif, after a careful and elaborate enquiry, considered that the compromise was beneficial to the minor and that there was no necessity to remove the minor's next friend, his father, and to substitute his grandfather in his place, and he directed that a decree be drawn up in terms of the compromise between the parties. It is against the rejection of that application of the maternal grandfather to be made the next friend of the minor in these proceedings that this Civil Revision Petition is filed.

The argument that has been urged before me is that the minor's father was not a proper next friend of the minor as his interest was adverse to that of the minor in the matter of the enforcement of the compromise, and, therefore, he should not have been allowed to continue as a next friend of the minor. This argument is put in a very ingenious way : first of all, it is said that this compromise amounted to a transfer of property because the compromise had been arrived at in a partition suit ; that, it being a transfer, the interest of the father is opposed to that of the son as the property involved included both the father's and the son's shares ; and finally that, as the father's interest was in conflict with that of the minor, he was not a proper next friend and therefore he should be removed. The fallacy of this argument is in supposing that the father has got any interest adverse to the minor in the suit. The father's interest and the minor's interest are exactly the same in the partition suit. If the minor was getting any property at all, the father will also get an equal share in that property himself. We may, therefore, take it that the father who is interested in securing his own share will be equally interested in securing the minor's share in the pro-

perty. The argument, therefore, fails altogether that the father's interest is adverse to that of the minor.

Linga Reddi v. Chengalraya Reddi.

The Munsif having found that the compromise itself was beneficial to the minor, a finding which I must accept in revision, there is no ground whatsoever for setting aside the minor's present next friend and introducing a new person in the shape of the maternal grandfather into the record. The petition therefore fails and is dismissed with costs.

It may be observed that two preliminary objections were taken to the hearing of this petition, but I have not thought it necessary to consider those objections in the view I have taken of the merits of the case.

A. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* AND MR. JUSTICE SRINIVASA AIYANGAR.

M. P. P. S. T. Palaniappa Chetty and others . . . *Appellants** *(Defendants)*

v.

S. N. Subramania Chettiar and another . . . *Respondents* *(Applicants).*

Palaniappa Chetty v. Subramania Chettiar.

Civil Procedure Code, O. 21, R. 16—Execution of decree—Right to apply for—Real owner under transfer of decree to benamidar—Right of—Application to be brought on record as transferee decree-holder—Maintainability—Proper application by transferee—Form and nature of.

There is no provision in the Civil Procedure Code for an application for bringing a person's name on record as a transferee decree-holder. The scheme of the Code is that the transferee by assignment in writing or by operation of law merely files his application for execution of the decree setting out either in it or in an affidavit he has filed in support thereof that he is the transferee either by operation of law or by any particular instrument in writing and thereupon the Court orders the application for execution or rejects it.

Petitioner applied for execution of a decree under O. 21, R. 16, Civil Procedure Code, alleging that he was the real owner under the transfer executed to one *S,* who was his agent, and who had obtained an instrument in writing transferring the decree to his name. The transfer was to the agent, *S,* personally. *Held,* that the petitioner was not entitled to execute the decree, because O. 21, R. 16, Civil Procedure Code, was a bar to his contention that the transferee, *S,* was his benamidar.

On Appeal from the order of the Hon'ble Mr. Justice Kumaraswami Sastri, dated the 2nd day of April, 1924 and

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*O S A No. 36 of 1924. 21st November, 1924.

Palaniappa Chetty v. Subramania Chettiar.

passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 98 of 1911.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for appellants.

E. Vinayaka Rao for respondents.

The Court delivered the following

Coutts-Trotter, C. J.

JUDGMENTS:—*The Chief Justice*:—The rule of law that, where a person's name appears on the face of the record as judgment-creditor and execution of the decree is sought by a transferee of the decree, the decree cannot be executed unless it comes within the words of O. 21, R. 16 of the Code of Civil Procedure and there has been an assignment in his favour either in writing or by operation of law seems to me to be no rule for holding that a person otherwise a stranger to the Court can come forward and allege that the decree was not his (the transferee's) and that he was a *benamidar* for himself. The learned Judge probably felt himself bound by *Manikkam* v. *Tatayya* (1), but I entertain no doubt whatever that that case was wrongly decided and was an unwarranted departure from, and an extension of the words of, the statute. And I accordingly come to the conclusion that this appeal must be allowed with costs in this Court as well as in the Court below.

I may add that the circumstances of the case which was allowed to crawl on to the very last day of a long period of limitation are extremely suspicious. But all that we are concerned with is the simple point of law. I ought to add, I think, that it follows from this expression of opinion that we must also dissent from the decision reported in *Abdul Kareem* v. *Chukhun* (2).

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree that the appeal should be allowed with costs. The petitioner applied in the Original Side not only for execution of the decree under O. 21, R. 16, but also by an independent Judge's summons for bringing his name on the record as a transferee decree-holder. There is no provision in the Procedure Code for any such application. I am not at all sure whether what is called "bringing on the record the transferee decree-holder" is not really a survival from times previous to the Procedure Code. The scheme of the Code is that the transferee by assignment in writing or by operation of law merely files his application for

1. (1898) I L R 21 M 388 : 8 M L J 48.
2. (1879) 5 Cal L R 253.

Palaniappa Chetty v Subramania Chettiar

Srinivasa Aiyangar, J.

execution of the decree setting out either in it or in an affidavit he has filed in support thereof that he is the transferee either by operation of law or by any particular instrument in writing and thereupon the Court orders the application for execution or rejects it. Therefore we must treat the present application really as an application under O. 21, R. 16. The contention of the respondent is that he was entitled to such execution because he was the real owner under the transfer executed to R. M. M. Subramania Chetti who was his agent and who had obtained an instrument in writing transferring the decree to his name. If the case of the petitioner were that the transfer was obtained by the agent in his name but in the *Vilasam* of the firm of which he was the agent then there could have been no objection whatever to execution being granted on the application of the petitioner because the appearance of the *Vilasam* in the name of the transferee would really be to the firm or person bearing the *Vilasam* even apart from its serving to secure the benefit of the transfer to the firm represented by the *Vilasam*. But in this case the transfer was to the agent personally. The question therefore is whether if there has been a transfer to a particular person under an instrument in writing, any other person is entitled to come to the Court and say that that transferee was a mere *benamidar* and that he, the applicant, is the real owner of the benefit secured by the transfer. It seems to me that O. 21, R. 16 is perfectly clear on the point. It speaks of the decree being transferred by assignment in writing or by operation of law and provides that in such cases the transferee may apply for execution. When the statute speaks of 'an assignment in writing' and 'the transferee,' the proper construction of the words would necessitate our holding that the transferee referred to is the transferee named as such in the assignment in writing. To hold otherwise would be not to give proper effect to the words of the statute. The learned vakil for the respondent has drawn our attention to *Manikkam* v. *Tatayya* (1). We are constrained to hold that it is a wrong decision. I am not able to understand what the learned Judge who delivered the main judgment in the case could have meant when he referred to the word 'representative' in S. 244 of the old Procedure Code as comprising the real owner under the trans-

1. (1898) I L R 21 M 388: 8 M L J 48.

Palaniappa Chetty v. Subramania Chettiar.
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Srinivasa Aiyangar, J.

fer of a decree. If such a person was the representative of the decree-holder or his transferee, then it follows that, under the express terms of S. 244, he could have no right of separate suit, but in another sentence in the same judgment the learned Judge speaks of two remedies being open to such a person, that, the real owner under the transfer of a decree, namely, one by way of application to the executing Court and another by way of separate suit, which is obviously opposed to S. 244, Civil Procedure Code. However that may be, we have no hesitation in holding that that case was wrongly decided. It is also clear that the Code of Civil Procedure did really intend to prevent *benamidars* coming in and making applications to the Court on the general basis of the law relating to *benami* transaction. In S. 66 of the Code express provision is made for Courts not recognising the *benami* character of purchases made at execution sales held by Court. We have also no doubt whatever that the express terms of O. 21, R. 16 excludes any such contention. The earlier case referred to in argument, *Abdul Kareem* v. *Chukhun* (2), having proceeded on the same basis as that of the judgment in *Manikkam* v. *Tatayya* (1), should also be held to have been wrongly decided and we therefore refuse to follow it. It would lead to very serious consequence if we should allow the law of *benami* to have any operation with regard to suits and proceedings and records of Court and, if, only on that ground, it would be desirable to disallow any such contention, we are however fortified in that view by the actual terms of the statute ; and therefore it follows that the applicant for execution in this case was wrongly granted execution of the decree.

This appeal should be allowed, and the respondents' petition for execution as well as that for bringing himself on the record as transferee decree-holder should be dismissed with costs.

A. S. V. *Appeal allowed.*

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1. (1898) I L R 21 M 388: 8 M L J 48.
2. (1879) 5 Cal L R 253.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* AND MR. JUSTICE SRINIVASA AIYANGAR.

The Official Assignee of Madras, Madras ... *Appellant** (*Respondent*)

v.

Basudevadoss Badrinarayan Doss ... *Respondent* (*Petitioner*).

The Official Assignee of Madras *v.* Badrinarayan Doss.

Transfer of Property Act, S. 59—Equitable mortgage—Land in the mofussil —Deposit of patta—Documents of title.

A patta in respect of land in the mofussil is a document of title by the deposit of which an equitable mortgage over the property can be validly created in the City of Madras.

On Appeal from the judgment of the Hon'ble Mr. Justice Ramesam, dated 19th February, 1923, passed in the exercise of Insolvency Jurisdiction of the High Court in I. P. No. 82 of 1921 in the matter of Y. V. Subbiah and S. Venkatasamy Naidu, insolvents.

The Advocate-General for appellant.

Messrs. Nugent Grant and *K. S. Narayana Aiyangar* instructed by *Messrs. Grant* and *Greatorex* for respondent.

The Court delivered the following

Coutts-Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—I am of the same opinion. I have had doubts in this case but the argument that concludes the matter to my mind is the fact which is known to every one familiar with these matters, viz., that, in many cases, the piece of paper which we call a patta is the only document that a ryot holds in respect of his land, and that to say he cannot effect a valid equitable mortgage of that piece of paper, would be in effect to say that he could not equitably mortgage his land at all—a result which I cannot believe to have been the desire of, or contemplated by, the framers of the Transfer of Property Act. I would rather wish to guard myself against the suggestion of my learned brother that, where a statute gives a definition for an instrument, that definition can be controlled by the understanding of the common people with regard to it, but I do not think that the decision of this case turns on that.

Finally, I have to say this. As this is a subject-matter with which I am very unfamiliar, I should require very grave

*O S A No. 53 of 1923. 26th November, 1924.

The Official Assignee of Madras v. Badrinarayan Doss.

reasons indeed to dissent from the opinion of two of my colleagues to whom the subject is familiar and who are acquainted with the land tenures of this Presidency in a way in which I cannot pretend to be.

I therefore agree in the result.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The only point raised and argued in this appeal is whether a patta in respect of land in the mofussil of the Presidency is such a document as by the deposit of which in the City of Madras an equitable mortgage over the property can be said to be validly created. The contention is that a patta is not a title deed or a document of title relating to property and that therefore the deposit of a patta cannot serve to create an equitable mortgage over the property. It is true that a patta has been held in various cases not to be a title deed, but in none of those cases had the question been raised or had to be decided with respect to a patta being a title deed or a document of title for purposes of the creation of a mortgage by mere deposit. It is quite true that a patta is not a title deed in all senses of that expression or for all purposes but at the same time it is clear that what is requisite for the creation of an equitable mortgage is firstly, an intention to create a security, and secondly such intention evidenced by a document which can be described as a document of title. There is no question here in this case about the intention. Is then a patta in respect of land a document with respect to property such as would be sufficient by being deposited to evidence the required intention ? It must vary according to the conditions of the country and the consciousness on the part of the members of the community. In England it has been held that all the material documents of title need not be deposited and that a complete title need not be shown by the deeds deposited to the depositor's interest in the estate. [*Ex parte Wetherell* (1)]. In that case Lord Chancellor Eldon was inclined to hold that that would be taken to be a sufficient deposit which could be taken upon looking at the instruments to amount to evidence that the estate was meant to be security. Thus in the absence of title deeds a receipt for purchase-money containing the terms of an agreement for sale was deemed sufficient. [*Goodwin* v. *Waghorn* (2)]. In the case of copyholds, copies of Court-rolls and in the case of a leasehold land,

1. 11 Ves Junior 398. 2. 13 L J 172 (N S).

The Official Assignee of Madras v. Badrinarayan Doss.

Srinivasa Aiyangar, J.

an office copy of the registered lease, have been held to suffice. In Ireland a map of the property was by deposit held to create an equitable mortgage [*Simmons* v. *Montague* (3)]. So far as South India is concerned, there is no doubt that a patta has generally been regarded as a document of title. I use the words "documents of title" and not "title deed," because it may be that there is some plausible distinction between the two expressions. I have no hesitation in holding that a patta has always been regarded by people in this country as a document of some evidence with regard to possession if not also to title. The original meaning of the word "patta" appears to have been 'a lease,' but it has always been used to indicate what is called occupancy right, that is, whether it be under a landlord who is a Zamindar or under the Government as suzerain occupancy right, which is really recognised to be practically proprietary right in the soil. Having regard to this meaning that the expression "patta" has acquired among the land-owning classes, it will lead to serious results if it should be held that a patta is not such a document of title as by depositing which an equitable mortgage could not be created. As a matter of fact, I am not at all sure whether in respect of a very large percentage of property in the country, there are any documents of title at all other than pattas.

I therefore hold that the learned Judge was right in holding that a patta was such a document as by depositing which an equitable mortgage could be created. The appeal therefore fails and is dismissed with costs on the Original Side scale.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Kodavati Subbamma and another ... *Appellants** (*Defts.*)

v.

Kodavati Papayya ... *Respondent* (*Plaintiff*)

Kodavati Subbamma v. Kodavati Papayya.

Deed—Construction—Will or authority to adopt—Necessity for registration.

A document executed by a Hindu and styled in more than one place as a will gave his widow power to adopt and contained the following arrangements regarding his property:—"My whole property shall be divided into two equal shares, one share being enjoyed by the adoptive mother and the other share by the adopted son. During her life-time the mother shall enjoy the said

*S A Nos. 1048 to 1050 of 1922. 21st October 1924.

3. (1909) Irish Reports 87.

Kodavati Subbamma v. Kodavati Papayya

property to her own liking. After her death the whole property in respect of the said share shall pass to the adopted son."

Held, that the document in question was a will and not a mere authority to adopt and was admissible in evidence without registration.

Santhana Sporamma v. *Santhana Mangayya,* (1913) M W N 199 ; *Tirugnanapal* v. *Ponnammai Nadathi,* 12 L W 660 distinguished.

Second Appeals against the decrees of the Court of the Additional Subordinate Judge of Ellore in A. S. Nos. 157, 134 and 158 of 1921 preferred against the decree of the Court of the District Munsif of Kovvur in O. S. Nos. 105, 4 and 6 of 1919 respectively.

A. Krishnaswami Aiyar and *C. V. Raghava Rao* for appellants.

P. Somasundaram, P. Satyanarayana, K. Venkiah and two others for respondent.

The Court delivered the following

JUDGMENT *in S. A. No.* 1048 *of* 1922 :—The only question argued in this Second Appeal is whether Ex. I is a will. The Subordinate Judge has held that Ex. I is not a will but an Anumathipatra, an authority to adopt and therefore it required registration ; and being unregistered it did not empower the 1st defendant to make a valid adoption. The finding is that the 2nd defendant has been adopted by the 1st defendant. The only question therefore is whether the 1st defendant had authority to adopt. If Ex. I is a will then her authority to adopt would be unquestioned, if Ex. I is not a will then the authority to adopt not having been given by an instrument in writing and registered would be of no use. Ex. I is headed as " will executed on 18th May, 1918, by Kodavati Pedarama Krishnamma's son Bullayya, and the closing lines of the document are " I am at liberty to cancel this will. This will is executed on my free will relating to these things, while of a sound state of mind."

The contention of Mr. Somasundaram on behalf of the respondent is that this document is not a will and the Court should not attach importance to a few expressions here and there that the document is a will. He contends that there is no disposition in the will and therefore it should not be construed as a will. He relies upon two cases, one *Santhana Sporamma* v. *Santhana Mangayya* (1)

1. (1913) M W N 199.

Kodavali Subbamma v. Kodavati Papayya.

and the other *Tirugnanapal* v. *Ponnammai Nadathi* (2). In the former case the executant addressed his wife in the second person and gave her certain directions ; in the second case the executant addressed his adopted boy in the second person and gave him a number of directions. In the former case, a Bench of this Court held that the document was not a will, in the second case their Lordships of the Privy Council held considering the general tenor of the document that it was not a will notwithstanding the use of the word " will " in the document. In both cases the construction turned upon the expressions used in the will. As I have observed in another case, it is not proper to interpret one document in the light of the words used in another document. Each document must be considered with reference to the words and expressions used in it, and if the document when read as a whole gives an impression that the executant intended to dispose of his property by it and that it should take effect after his life, then, whatever may be the words used in the document the general intention should not be overlooked in executing the terms of the document. In Ex. I, I think the intention of the executant to devise the property to his wife is clear. The operative clause of the document is " my whole property shall be divided into two equal shares, one share being enjoyed by the adoptive mother and the other share by the adopted son. During her life-time, the mother shall enjoy the said property to her own liking. After her death the whole property in respect of the said share shall pass to the adopted son." I think these words clearly indicate that the executant did intend that his wife should get a benefit under the document. Under the Hindu Law, the moment the adoption is made, the widow is divested of her estate and the adopted son gets the whole of the property. The adoptive mother will be entitled thereafter only to maintenance. In order to avoid trouble in future the executant of Ex. I provided that in case of disputes between his wife and the adopted boy, the adoptive mother should have half of the property for her life. I think from the words of the document, the intention to devise property to the wife can be clearly gathered. As I said the main thing to be considered in a document of this kind is whether the executant had an intention to devise his properties to any one; in other words whether the will contains clear words as to the testamentary intention

2. (1920) 12 L W 660 (P. C.)

Kodavati Subbamma v. Kodavati Papayya.

on the part of the executant. Reading Ex. I as a whole I have no hesitation in holding that it is a will. This finding necessarily involves the consequence that the 2nd defendant's adoption is a valid one.

In the result the Second Appeal is allowed and O. S. No. 105 of 1919 is dismissed with costs throughout.

In S. A. Nos. 1049 *and* 1050 *of* 1922.

JUDGMENT :—In consequence of the finding in the connected case S. A. No. 1048 of 1922 that the adoption is a valid one, these appeals also are allowed but in the circumstances it is unnecessary to allow costs to the appellant.

The memorandum of objections is not pressed and is dismissed.

A. V. V. *Appeal allowed : Memo of Objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

A. L. V. R. P. Veerappa Chettiar represented by his authorised agent M. V. Somanatha Aiyar ... *Petitioner** (*Plaintiff*)

v.

Municipal Council, Palni, represented by its Chairman ... *Respondent* (*Deft.*)

Veerappa Chettiar v. Municipal Council Palni.

District Municipalities Act, Ss. 93, 95—*Applicability—Effect—"Residence" in S.* 95—*Meaning—Person not residing within Municipality but having resident collection agent therein for collection of rents of lands situate outside Municipal limits—Liability to profession-tax—Person residing within Municipality and drawing income from rent of houses outside it—Liability to tax of.*

S. 93 of the District Municipalities Act only lays down the qualification for liability to tax and has nothing to do with the conditions under which the tax becomes payable. That is dealt with under S. 95 of the Act.

"Residence" in S. 95 of the Act means personal residence, and one who neither himself personally resides nor maintains a residence for himself or his family within the Municipality but merely maintains an office for the collection of his rent cannot be said to reside within the Municipality.

Plaintiff was a Nattukottai Chetti whose profession was moneylending which he exercised at Devakottah. He had purchased a Zamindari in the Palni Taluq. The Zamin was situated wholly outside the limits of the Palni Municipality. The plaintiff maintained in the Palni Town a resident collection

*C R P No. 413 of 1923. 5th December, 1924.

agent who collected his Zamin's rent for him. The plaintiff did not reside within the Municipality for sixty days in the half-year in question. Nevertheless, the Court below held that the plaintiff had, through his agent, been in receipt of income within the Municipality and was therefore liable to be taxed for profession-tax.

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Held, reversing the decree of the Court below, that the plaintiff did not reside within the Municipality and was therefore not liable to pay the profession-tax.

Quaere:—Whether the levy of tax was open to objection also on the ground that as all plaintiff's Zamin land rents had already been taxed to a fixed peishkush, the peishkush could not be increased by a further tax by the Municipality.

Semble :—A person residing within the Municipality and drawing income from rent of houses outside it is liable to pay profession-tax.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree and judgment of the Court of the District Munsif of Palni in S. C. No. 306 of 1922.

T. L. Venkatrama Aiyar for petitioner.

K. V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The petitioner seeks for the revision of the decree of the Lower Court in a Small Cause suit instituted by the plaintiff to recover from the defendant, the Municipal Council of Palni, the amount of profession tax levied on him by the Council for the half-year ending 31st March 1922. The facts appear to be as follows : The plaintiff is a Nattukottai Chetti, whose profession is money lending and he exercises that profession at Devakottah. He has purchased the Zamindari of Rattiampadi in the Palni Taluq. This Zamin is situated wholly outside the limits of the Palni Municipality. The plaintiff maintains in the Palni town a resident collection agent who collects his Zamin's rent for him. In these circumstances the Lower Court has held that the plaintiff has through his agent been in receipt of income within the Municipality and is therefore liable to be taxed for profession tax.

The legal correctness of this decision depends on the interpretation of Ss. 93 and 95 of the Madras District Municipalities Act. It is contended for the petitioner that he or his agent is not a person in receipt of income from " any source other than houses or lands inside the Municipal limits, " and it is sought to make the words "inside the Municipal limits" qualify " source " and not "houses and lands." This view is untenable. There is no reason whatever why a person residing

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within the Municipality and drawing income from rent of houses outside it should not pay profession tax as he obtains the benefit of Municipal activities in the same manner as any other resident. The phrase is clearly used in order to exempt a person from paying profession tax on rent from property inside the Municipality, since he is already taxed on that under S. 81.

We cannot say that the petitioner is not *in receipt* of this income. He admits that his agent collects it and remits it to him. He is therefore *prima facie* liable under S. 93 if he has been in receipt of that income within the Municipality for the period laid down in S. 95. S. 95 lays down that, though a person may be liable for the tax under S. 93 it is not payable unless he resides in the Municipality for sixty days in the half-year in question. This proposition is not affected by the principle laid down in illustration (3) of S. 93, because S. 93 is only laying down the qualification for liability to tax and has nothing to do with the conditions under which the tax becomes payable. That is dealt with under S. 95. This point has been overlooked by the Lower Court and it has thus fallen into an error.

Now, the plaintiff in his plaint clearly stated that he never resided in Palni for sixty days in the half-year. In the written statement the Council did not controvert that statement. Had the plaintiff resided for 60 days in the half-year it would have been the most obvious answer to the plaintiff's suit. We must take it then that the plaintiff did not reside within the Municipality for sixty days in the half-year in question.

The respondent has tried to argue that 'residence' will include 'the maintenance of an office' although the principal never appears there. No doubt the word "residence" has been interpreted in various ways when it has been necessary to interpret its meaning in income-tax and other statutes, but we think that its meaning in this Act may be decided by a consideration of the reported rulings under the old District Municipalities Act of 1884, and the consequent alteration of the provisions in the new Act. Under the old Act, S. 55, a person exercising a profession, etc., or holding an office was liable under S. 53 to the tax, and had to pay it, if he exercised the profession or held the office for sixty

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days in the half year. In the two rulings in *Chairman, Ongole Municipality* v. *Mounsey* (1) and *Hammick* v. *President, Madras Municipal Commission* (2) this Court held that a Government servant, whose Head Office was in the Municipality, was not, while he was himself outside the Municipality, holding his office within the Municipality. So that, unless he himself was for 60 days within the Municipality, he was not liable to the tax. To meet that difficulty, we presume, the Legislature provided in Schedule IV, R. 18 of the new Act that a person must be deemed to have exercised a profession or held an appointment for the period specified in S. 95 "if his principal office is within the Municipality and his connection therewith has lasted for the specified number of days." Under the old Act the test for liability in the case of a person holding an appointment was personal presence within the Municipality. Under the new Act, in such a case personal presence is not necessary. Had the Legislature meant that, in the case of persons in receipt of pension or income, personal presence in the Municipality was equally not necessary, we think they would have made it equally clear. We think, therefore, that the test in such a case is personal presence within the Municipality, and that 'residence' in S. 95 has to be interpreted in the sense of personal residence and that one who neither himself personally resides nor maintains a residence for himself or his family within the Municipality but merely maintains an office for the collection of his rent cannot be said to reside within the Municipality. The petitioner, on this ground, therefore will not be liable to pay the profession tax.

The petitioner raised a further ground of objection, namely, that since all his Zamin land rents are already taxed to a fixed peishkush, this peishkush cannot be increased by any further tax by Government, either directly by Government itself or indirectly by Government authorising a Municipality to tax such rent without a direct statutory declaration of its interference with his permanent Sanad rights. He quoted *Chief Commissioner of Income-tax* v. *Zamindar of Singampatti* (3) in aid of his contention that the State cannot authorise a Municipality to levy a tax which it cannot itself levy. This question is not free from difficulty but need not be decided in this case.

1. (1894) I L R 17 Mad. 453. 2. (1898) I L R 22 Mad. 145 : 8 M L J 164
3. (1922) I L R 45 Mad. 518.

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On the ground that the petitioner has not resided for sixty days within the Municipality, the levy of a profession-tax on him was contrary to law. We must hold that he was not liable for this tax and that the Lower Court has made a mistake in law in dismissing this suit. We think this is a case in which we must interfere in revision. We reverse the decree of the Lower Court and give the plaintiff a decree for the amount sued for with costs in both Courts.

A. S. V. *Decree reversed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Doraiswami Mudaliar and Thangavelu Mudaliar and Company ... *Appellants** (*3rd Deft.*)

v.

M. Doraiswami Aiyangar and others ... *Respondents* (*Plaintiffs and 2nd defendant*).

Doraiswami Mudaliar v. Doraiswami Aiyangar.

Debt—Assignment—Unstamped letter—Admissibility of other evidence—Evidence Act, S. 91—Assignment, what constitutes—Mere direction to pay—Fund out of which payment is to be made, to be specified—Assignment of a portion of the debt—Not valid.

Where a letter purporting to assign a debt is unstamped and therefore inadmissible in evidence, secondary evidence cannot be given of its contents. *Rajah of Bobbili* v. *Inuganti China Sitaramaswami Garu,* I L R 23 M. 49 (P C) relied on.

Where an instrument is relied on as an assignment of a debt, it must contain words of transfer of the debt. A mere direction to the debtor to pay is not sufficient. To operate as an equitable assignment it is essential that the instrument relied on must specify the fund out of which the payment is to be made. An assignment of a debt to be valid, must be of the whole debt. English and Indian Case-law reviewed.

Second Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 102 of 1921, preferred against the decree of the Court of the Munsif of Vellore in O. S. No. 531 of 1919.

C. V. Anantakrishna Aiyar for appellants.

B. Somayya for respondents.

The Court delivered the following

JUDGMENT :—The facts of this Second Appeal may be briefly stated. The 2nd defendant is a contractor who entered into a building contract in respect of the Vellore Municipal

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* S. A. No. 1691 of 1922. 13th November, 1924.

Hospital Works with the P. W. Department. By September 1914 a sum of Rs. 2,156-8-1 was due to him. At that time he owed Rs. 1,600 to the 3rd defendant. When the 3rd defendant demanded the payment of his debts, he executed certain letters intending (I assume this in favour of 3rd defendant) to transfer Rs. 1,600 out of the amount due to him from the P. W. D. In December, 1914, he owed Rs. 6,750 to the plaintiffs and intending to transfer the whole of this said amount, he executed similar letters. The documents that came into existence in September and December respectively may be shown in a tabular form as follows :—

	3rd Deft. dated 22—9—14.	Plffs. dated 10—12—14.
2nd defendant to assignee.	Letter not exhibited.	Exhibit C.
2nd defendant to the Ex. Engineer.	I	" E.
Assignee to Executive Engineer.	III	" D.
Reply by Executive Engineer to Assignee.	II	Endorsement on D.

From the above table, it is seen that, on each occasion, the scheme was the same, consisting of (1) a letter from assignor to assignee *as an instrument* of transfer, (2) a letter from assignor to Executive Engineer being the notice intended by S. 130 of the Transfer of Property Act. The letter of transfer to the 3rd defendant though referred to in Ex. III is not forthcoming. It is admitted to be unstamped (D. W. 1) and no secondary evidence can be given of its contents [*Raja of Bobbili* v. *Inuganti China Sitaramaswami Garu* (1)]. In the written statement of 3rd defendant, it was alleged (paras. 3 and 5); "When the second defendant was demanded payment, he gave this defendant a letter of authority asking him to draw Rs. 1,600 from the amount due to him for the Pentland Hospital Works and also he sent a letter to the Executive Engineer, North Arcot, asking him to pay the said amount to this defendant. This was on or about the 22nd September, 1914. The alleged assignment referred to in para. 4 (plaint) is a fraud and not sustainable in law when the second defendant had already given *a letter of assignment* to this defendant to draw the amount, referred to in para. 3 of this statement." It is therefore clear that the only assignment to the 3rd defendant pleaded by him is the letter addressed to

1. (1899) I L R 23 M 49 (P C).

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him, of which no secondary evidence can be given. As the assignment to 3rd defendant cannot be proved, it follows that there is no assignment in his favour and the appeal must fail on this ground. Mr. Anantakrishna Aiyar contends that, apart from the assignment intended by the missing letter Exhibit I only is enough to prove an assignment. In the first place, this is opposed to the pleadings in which the letter of 22nd September, 1914 other than Exhibit I was described as the letter of assignment and the plea cannot be allowed to be raised. In the second place, to allow the plea to be raised is an evasion of S. 91 of the Evidence Act and of the Stamp Law and the principle of ruling in *Raja of Bobbili* v. *Inugant China Sitaramaswami Garu* (1). A perusal of Exhibits I and III only or of even I alone leaves in one's mind the impression that something like a transfer was intended. It is so easy to infer the transfer but to allow such an inference to be made and to give effect to it is to allow secondary evidence of the letter of assignment to be given.

For the sake of argument, I will leave these two considerations aside and consider the question whether Ex. I by itself amounts to an assignment. In my opinion, if the matter is dealt with, apart from the English decisions to be considered lower down, it does not. There must be words of transfer in the instrument. A notice to the debtor not containing words of transfer nor referring to a transfer is not an instrument of transfer. Otherwise every order of payment is a transfer. Every cheque or Bill of Exchange is a transfer. In the first place one would expect that an instrument of transfer should in general be an instrument executed in favour of the assignee. I say 'in general,' for there is the well-recognised exception of a transfer effected by an endorsement on the bond or other paper evidencing the debt sought to be transferred. The case in *Rama Iyen* v. *Venkatachallam Pattar* (2) is an example. So also is the decision in *Harding* v. *Harding* (3). In civilised communities, such an endorsement ordering the debtor to pay has been always considered as a transfer—an idea borrowed from the law and practice of Negotiable Instruments—and the intention is given effect to by recognising the endorsement as a transfer. But, apart

1. (1899) I L R 23 M 49 (P C).
2. (1906) I L R 30 M 75 : 16 M L J 554.
3. (1886) 17 Q B D 442.

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from such cases, I would expect an instrument of transfer to be addressed to the assignee. The settlement of accounts containing the entry in *Seetharama Aiyar* v. *Narayanaswami Pillai* (4) was between the assignor and assignee and must be regarded as addressed to the assignee. But assuming that the instrument may be addressed to the debtor, there must be words operating as a transfer.

In England, the matter has been complicated by the history of the law relating to the assignment of choses in action. At common law, except in the case of an annuity, a chose in action cannot be assigned at all. The inconvenience of the rule was avoided by permitting the assignee to sue in the name of the assignor [*see* reference in f. n. (*n*) to S. 780 of Halsbury, Vol. IV]. The case where the debtor consents and novatio is effected is really not an assignment. But Courts of Equity recognised equitable assignments from the earliest times [*Ryall* v. *Rowles* (5)]. The assignment may be verbal (Halsbury, Vol. IV, S. 796). An agreement to assign is enough. [*See* Tudsbery on *Equitable Assignments*, pp. 53 and 54 and *Ryall* v. *Rowles* (5*a*)]. An agreement may be made out from a course of dealing between the parties. (Halsbury, Vol. IV, S. 796). An order to pay will be enough provided the intention is clear. *William Brandts, Sons and Co.* v. *Dunlop Rubber Co., Ltd.* (6). Then came the Judicature Act, S. 25 (6). The Act created no new rights but enabled the assignee to sue in his own name. It has not made assignable contracts which were not assignable in equity before. Nor does it impair the efficacy of equitable assignments which would previously have been valid (Halsbury, Vol. IV, S. 783). Mr. Anantakrishna Aiyar also contended that no particular form of assignment under the Statute is required, and relied on Halsbury, Vol. IV, S. 788, where it is said, "A direction or order by the creditor to pay the amount is sufficient" and reference is given to *Harding* v. *Harding* (3) and *Brice* v. *Bannister* (7). In the former (not a case of debt) the assignor George Harding writes the instruction to pay at the foot of the account furnished by the trustees. The case is similar to *Rama Iyen* v. *Venkatachallam Pattar* (2). Wills, J. recog-

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2. (1906) I L R 30 M 75 : 16 M L J 554.
3. (1886) 17 Q B D 442.
4. (1916) 47 I C 749.
5. 1 W & T L C 98 and notes.
5a. 1 W & T L C 111.
6. (1905) A C 454.
7. (1878) 3 Q B D 569.

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nises that, "before the Judicature Act, it would have been impossible to give a legal title to Laura Harding, so as to enable her to sue in her own name in respect of this right of action; she could have maintained a suit in equity, but the legal title could not have been completed in her. Now it can be done." He then points out that the trustees assented to the assignment. "It seems to me that that fact carries us a step further, and imports into the case another doctrine of equity." Lord Alverston, C. J. in *Brandts, Sons and Co.* v. *Dunlop Rubber Co.* (8) thinks this is the real ground of the decision—a remark not affected by the reversal of the decision by the House of Lords in *William Brandts, Sons and Co.* v. *Dunlop Rubber Co., Ltd.* (6) as I shall show lower down. In *Brice* v. *Bannister* (7) the only point argued and decided was that there can be a good equitable assignment of a future debt. It is true that Lord Coleridge, C. J. regarded it as a good assignment under the statute, but on appeal, this position was attacked and the counsel for the respondent supported the judgment on the ground that there was a good assignment in equity. Cotton, L. J. opens his judgment by saying that there was a "good equitable assignment." Brett, L. J., who dissented discusses the case only on that footing. None of the Lords Justices refers to the Statute. This has been pointed out by Chitty, L. J. in *Durham Brothers* v. *Robertson* (9). "It is necessary to refer to *Brice* v. *Bannister* (7). Lord Coleridge, C. J. held that the assignment was within the 25th section. The Court of Appeal decided the case quite apart from the Act. Cotton, L. J. expressly decided the case on the ground of equitable assignment. Bramwell, L. J. reluctantly assented to this view. Brett, L. J. dissented but on general principles. So soon as it was ascertained that there was a good equitable assignment, with power to give a discharge, it became unnecessary to consider whether it fell within the Act or not." In *William Brandts, Sons and Co.* v. *Dunlop Rubber Co., Ltd.* (6) Lord Macnaghten says in (p. 461): "With the utmost deference to the Court of Appeal, I have great difficulty, in following their reasoning. The plaintiffs' case was put in two ways. It was presented as a case within sub-sec. 6 of S. 25 of the Judicature Act. It was also presented as a simple case of equitable assignment

6. (1905) A C 454.
7. (1878) 5 Q B D 569.
8. (1904) 1 K B 387 at 394.
9. (1898) 1 Q B 765 at 773.

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perfected by notice. Unfortunately the stress of the argument was laid on the Judicature Act. The Court of Appeal devoted almost the whole of their attention to it. The substantial question—the only question worth considering—was all but ignored. It was treated as subordinate to the question on the statute and bound up with it. The Lord Chief Justice, with whom the other members of the Court agree, says, "I come to the conclusion that this document does not fulfil that which is necessary in order to entitle the plaintiff to sue, on the ground that it is not an absolute assignment or *an assignment at all within that section.*" Why that which would have been a good equitable assignment before the Statute should now be invalid and inoperative because it fails to come up to the requirements of the Statute, I confess I do not understand. The Statute does not forbid or destroy equitable assignments, or impair their efficacy in the slightest degree. When the rules of equity and the rules of the Common Law conflict, the rules of equity are to prevail. Before the Statute, there was a conflict as regards assignment of debts and other choses in action. At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the rule in equity. In certain cases, the Judicature Act places the assignee in a better position than he was before. Whether the present case falls within the favoured class may be doubted. " But, " says the Lord Chief Justice, " the document does not, on the face of it, purport to be an assignment nor use the language of an assignment." " An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain." After the references I have made to Cotton and Brett, L. JJ. in *Brice* v. *Bannister* (7), to Chitty, L. J. in *Durham Brothers* v. *Robertson* (9) and to Lord Macnaghten in *William Brandts, Sons and Co.* v. *Dunlop Rubber Co., Ltd.* (6), I confess I do not understand the sentence in S. 788 of Halsbury, Vol. IV. It seems to me conclusive from the manner in which Lord Macnaghten deals with Lord Alverston, C. J.'s judgment that, an assignment to be under the statute

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6. (1905) A C 454. 7. (1878) 3 Q B D 569. 9. (1898) 1 Q B 765.

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must either "purport to be an assignment or use the language of an assignment."

Now the Privy Council in *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya*(10) say: "The error arose from the learned Judges not having appreciated that the positive language of the section precluded the application in India of the principles of English Law on which they based their decision."

Mr. Anantakrishna Aiyar referred to me to *Nandubai* v. *Gau* (11). There, Chandavarkar, J. relies on a sentence from Leake on *Contracts*, 3rd Edition, p. 1005. The passage also occurs in the 8th Edition at p. 881 and runs thus : "But an order for payment out of a debt accruing due under a contract, as for goods sold, or for work and labour, or the like, is an assignment of a debt which must be stamped as a transfer of property." *Buck* v. *Robson* (12) is cited as an authority. On an examination of the case I find that the latter is not an order of payment but contains express words of assignment. It runs: "I hereby assign to Messrs. R. & Son, etc." It was held that the latter was not an order for payment of money. The point discussed was that the latter related to a debt that may accrue due in future. The Court, following *Brice* v. *Bannister* (7) and differing from *Ex parte Shellard, In re Allans* (13) Bacon, V. C. held that it was assignment and it was admitted to evidence on payment of penalty. I do not think that the case supports the statement in Leake or the decision in *Nandubai* v. *Gau* (11).

I may point out that there are other difficulties in the way of holding Ex. I to be an assignment. For the letter Ex. I to operate as an equitable assignment, the fund out of which the payment was to be made should be specified and if no fund is specified, the order does not operate as an equitable assignment. [Halsbury, Vol. IV, S. 801, p. 378] citing *Percival* v. *Dunn* (14) where the order was handed to the third party as is the case before me[*Ryall* v. *Rowles* (5*b*) citing *Rodick* v. *Gandell* (15)]. But a more formidable difficulty is that the assignment of a debt must be of the whole debt. It is true that the word "absolute" in the English Statute does not occur in the Transfer of Pro-

5b. 1 W & T L C 112.
7. (1878) 3 Q B D 569.
10. (1912) I L R 37 Bom 198 at 210.
11. (1902) I L R 27 Bom 150.
12. (1878) 3 Q B D 686.
13. (1873) L R 17 Eq 109.
14. (1885) 29 Ch D 128.
15. 1 D C G M & G 763 : 43 E R 893.

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perty Act. But the effect of the word 'absolute' is that it should not be by way of charge [*Durham Brothers* v. *Robertson* (9)] and the omission of the word permits an assignment of the debt by way of security [*Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* (10) : see also *Venkatachelam Aiyar* v. *Subramania Aiyar* (16)]. But the distinction between absolute transfers and transfers by way of security has nothing to do with the question whether the assignment should be of the whole or may be of a part. In my opinion the assignment of the debt must be of the whole and cannot be of part. The observations of Chitty, L. J. in *Durham Brothers* v. *Roberston* (9) at page 774 are pertinent. "It does not say 'or any part of a debt or chose in action.' It appears to me as at present advised to be questionable whether an assignment or part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit." . The right of assignment is not a common law right and is the creation of the Act and I do not think the Act ought to be construed so as to cause such obvious inconvenience to the debtor. Darling, J. expresses a similar doubt in *Jones* v. *Humphreys* (17). Lord Alverstone, C. J. uses words to the same effect in *Brandts, Sons and Co.* v. *Dunlop Rubber Co.* (8) and the reversal by the House of Lords in *William Brandts, Sons and Co.v.Dunlop Rubber Co., Ltd.*(6) does not affect this portion of the Lord Chief Justice's judgment. The different opinion of Darling, J. in (1902) 1 K. B. at 14 does not convince me the decision being reversed by the Court of Appeal (on another point), as the reasons given do not meet the difficulties pointed out by Chitty, L. J. in *Durham Brothers* v. *Robertson* (9). He deduces his conclusions from the fact that a future debt may be assigned. In *Sabjan Sahib* v. *Abdul Aziz Sahib* (18), Seshagiri Aiyar, J. makes an observation that the omission of the word 'absolute' was perhaps intended to settle the conflict in the English decisions. I have already pointed out that the word 'absolute' is used in contrast to 'by way of

6. (1905) A C 454.
8. (1904) 1 K B 387 at 395.
9. (1898) 1 Q B 765.
10. (1912) I L R 37 Bom 198 at 210.
16. (1912) 11 M L T 245.
17. (1902) 1 K B 10.
18. (1917) 42 I C 684 at 693.

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security' and has nothing to do with the point now raised. An assignment may be of the whole debt by way of security though when the security is worked out, a part only may suffice. There may be a series of assignments each of the whole debt by way of security. The assignees will then be in the position of a number of mortgagees. I am therefore of opinion for all these reasons that Ex. I is not an assignment or a valid assignment.

The appeal fails and is dismissed with costs of respondents 1 to 4 (plaintiffs).

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

The Secretary of State for India in Council represented by the Collector of Kistna ... *Appellant** (*Defendant*)

v.

Dewan Bahadur Yellepeddi Janakiramayya Pantulu Garu and another ... *Respondents* (*Plaintiff and his Legal Representative*).

Secretary of State for India v. Janakiramayya Pantulu.

Inam—Resumption—Issue of ryotwari patta by Government—Resumption declared illegal—Effect of—Right of pattadar to recover cist paid.

The Government resumed a devadayam inam and granted a ryotwari patta to the plaintiff's vendor in respect of the lands. After his purchase the plaintiff got a patta in his name and paid the cist on the lands. The resumption by Government having been declared to be illegal by a competent Civil Court, the plaintiff brought a suit for recovery of the cist paid from the Government on the ground that the consideration for the levy of the assessment had failed.

Held, that the plaintiff's suit was unsustainable. The plaintiff having purchased the property with full knowledge that the right of Government to resume the land was being questioned, there was no question of his right to recover money paid under a misapprehension.

Harnath Kunwar v. *Indar Bahadur Singh,* I L R 45 A 179 distinguished.

The issue of a patta by Government in favour of the plaintiff not only did not convey the land in question to the plaintiff but did not even create a contract in respect of the land between him and the Government.

Secretary of State for India in Council v. *Kasturi Reddi,* I L R 26 M 268; *Secretary of State for India* v. *Raghavachari,* 47 M L J 503 relied on.

Appeal against the decree of the District Court of Kistna at Masulipatam in O. S. No. 3 of 1919.

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*Appeal No. 185 of 1921. 26th November, 1924.

Secretary of State for India v Janakiramayya Pantulu.

Odgers, J.

The Government Pleader for appellant.

S. Varadachariar and *A. Venkatachalam* for respondents.

The Court delivered the following

JUDGMENTS :—*Odgers, J.* :—Government appeals from a decree of the District Court of Kistna whereby the plaintiff-respondent was held entitled to recover a sum paid by him to Government as cist of a certain village between 1912—1916. The village in question was originally a Devadayam inam attached to a temple at Kara. Government resumed the inam in 1908 or 1909 on the ground that the services were not being performed and granted a ryotwari patta to one Ankitam Raja Rao who was in fact the hereditary trustee. The validity of the resumption was challenged in O. S. No. 28 of 1911 of the Temporary Subordinate Judge's Court, Masulipatam. Meanwhile Ankitam Raja Rao had transferred the village to three others. The suit (O. S. No. 28 of 1911) was instituted on 20th April, 1911, and on 26th April, 1911, the present plaintiff-respondent entered into an agreement with the three persons aforesaid to purchase the village. This was completed by Ex. K, 19th August, 1911. Subsequently, plaintiff-respondent paid the assessment demanded by Government and obtained a patta, Ex. N, of the village in his own name on 26th January, 1914. The suit, O. S. No. 28 of 1911, was decided on 8th February, 1916, the Court holding that the resumption was illegal and in the absence of an appeal this declaration became final and established the right of the temple to the inam. The plaintiff's case in the present suit under appeal was that the consideration for the levy of the assessment had failed, he having purchased the property in the belief that Government was the owner and that his title had been recognised by the grant of patta to him. The plaintiff also pleaded that he had obtained no benefit by the sale and grant of patta as the tenants had disputed his title to recover rent from them. The District Judge held that there was a contract between Government and plaintiff and that this contract was void under S. 20, Contract Act, as both parties were under a mistake as to a matter of fact essential to the agreement and that it was not necessary for plaintiff to show that he had had to pay damages to a third party (in this case, the temple) before he could recover. Consequently under S. 65 of the Contract Act the plaintiff was entitled to recover. It has not in fact been decided by the Lower Court whether

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Odgers, J.

plaintiff did obtain any and what benefit from this transaction and we were urged by Mr. T. M. Krishnaswami Aiyar to send the case back on this ground alone, but on the view of the matter that I take, I think this will be unnecessary. I am by no means convinced that plaintiff was in April, 1911 under any mistake of fact. Ex. K recites that the lands sold to plaintiff are in the claim and enjoyment of the vendors. On 30th May, 1912 plaintiff petitioned to relinquish 102 acres of what he had bought by Ex. 1 (*a*), which was accepted on 16th November, 1912. In Ex. P plaintiff asks that in a suit between himself and a tenant the case should be kept pending a possible appeal by Government against the order declaring the resumption illegal. That was in 16th February, 1916. That suit and others were dismissed on 21st February, 1916. In Ex. III, dated 25th August, 1917, plaintiff applied for a refund of the assessment paid. The Collector in his order, Ex. IV, dated 6th June, 1918, points out that no mesne profits were claimed or allowed to the temple in O. S. No. 28 of 1911. He continues that no refund can be allowed as the patta with the fixed amount of assessment was accepted by petitioner, who was in possession of the village on strength of the patta and made the payment of assessment voluntarily. On these documents it is impossible to say that a case of mistake has been established. The facts are equally consistent with the plaintiff having with his eyes open contracted for the village in question and as being willing to run the risk either of an appeal by Government succeeding or of his ability to extract rent from the tenants. There is no evidence that plaintiff did not know that suit O. S. No. 28 of 1911 had been instituted at the date of his contract on 26th April, 1921 and he has not gone into the witness-box to deny it. That suit was dismissed by the Subordinate Judge on 11th January, 1913 and on remand, decreed on 8th February, 1916. The plaintiff applied for patta on 26th January, 1914 and was thus perfectly well aware at least at the latter date that the matter of the resumption of the inam was being litigated.

The Privy Council case cited in *Harnath Kunwar* v. *Indar Bahadur Singh* (1) depended on a misapprehension of the private rights of the vendor. There can be no such misapprehension here when plaintiff accepted patta and when he knew the title of Government was being questioned in litigation. On

1. (1922) I L R 45 A 179 : 44 M L J 489 (P C.)

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Odgers, J.

the point of the existence of a contract between plaintiff and Government, it is necessary to consider the nature of a patta, as to whether it is a contract or a grant of the land itself. In *The Secretary of State for India* v. *Venkatapatha Raju* (2), it was held that the liability to pay revenue does not rest on contract or some relation resembling contract. In *The Secretary of State for India in Council* v. *Kasturi Reddi* (3) Bhashyam Aiyangar, J. says it is in the nature of a mere bill and is not and does not purport to be in the nature of a grant or conveyance. He held that the question whether a patta was issued or not was immaterial on a question of title. See also *The Secretary of State for India* v. *Raghavachariar* (4). The same learned Judge in *Gunnaiyan* v. *Kamakshi Aiyar* (5) considering the nature of resumption says, " Even, when the Government exercises its right of resumption, it rarely, if ever, resumes the land even if the land itself had been granted as inam. It simply resumes the full assessment and it does so by the imposition of full assessment upon the land and converts it into ordinary ryotwari tenure." [See also *Boddupalli Jagannadham* v. *The Secretary of State for India in Council* (6) and *Muhammad Esuf Sahib* v. *Moulvi Abdul Sathur Sahib* (7).

These authorities are in my opinion conclusive on this question and therefore the issue of a patta not only did not convey the land in question from Government to the respondent but did not even create a contract in respect of the land between them.

The remaining question is one of limitation. The District Judge has held that Art. 96 applies and that the suit was brought within three years of plaintiff's discovery of the alleged mistake. The respondent here relies on Art. 96 or 120. On the other hand appellant refers to S. 59 of the Revenue Recovery Act (II of 1864) made applicable by S. 29 (1) of the Limitation Act and alleges that the cause of action arose on 8th February, 1916 when the resumption was declared illegal. S. 59 of Act II of 1864 reads as follows :—

" Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act, except as hereinbefore provided, from applying to the Civil Courts for redress : provided that

2. (1912) 23 M L J 746. 3. (1902) I L R 26 M 268 at 272 : 12 M L J 453.
4. (1924) 47 M L J 503. 5. (1902) I L R 26 M 339 at 346.
6. (1903) I L R 27 M 16. 7. (1918) I L R 42 M 161 : 36 M L J 262.

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Odgers, J.

Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose."

It was held in *The Secretary of State for India* v. *Nagaraja Aiyar* (8) that the section was confined to cases of persons being aggrieved by illegal or irregular proceedings taken for collection of revenue under the provisions of the Act. I am of opinion that the collection of assessment from the plaintiff might fall within this definition, but we have no details and there is no evidence of the circumstances under which the collections were made. It is not, however, necessary in the view I take of the facts in this case and of the effect of the grant and acceptance of a patta to decide the point definitely. In my opinion the appeal succeeds as to the return of the assessment levied and must be allowed with costs throughout.

Phillips, J.

Phillips, J. :—I agree.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Ramaswami Pillai and others ... *Appellants** (*Defendants* 1 *to* 4)

v.

V. R. M. K. Muthukaruppan Chetty and others ... *Respondents* (*Plaintiffs*).

Ramaswami Pillai v Muthu-karuppan Chetty.

Partnership—Dissolution by death of partner—Suit by partner against legal representatives of deceased partner—Particular items alone claimed—No claim for taking accounts—Rule of English Law—Exceptions—Absence of personal knowledge of defendants—Justice as between parties.

After the dissolution of a partnership by the death of a partner, another partner sued the legal representatives of the deceased partner to recover certain specific sums of money alleged to be due to the partnership from the deceased partner. No final settlement of accounts had taken place and the defendants had no personal knowledge of the transactions and the business of the partnership. *Held,* the defendants were entitled to have all questions at issue determined by the taking of final accounts, as that alone would do justice to all the parties. A suit for specific sums of money alone without a prayer for an account would not be maintainable.

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*Appeal No. 153 of 1922. 25th November, 1924.

8. (1923) 44 M L J 645.

Ramaswami Pillai v. Muthukaruppan Chetty.

It is a well-established rule in English Law that Courts will not interfere between one partner and another unless it be for the purpose of dissolving the partnership or, if it was dissolved, of finally winding up its affairs. This rule has in later years been considerably relaxed when justice demanded the Court's intervention to prevent some definite wrong or redress some particular grievance, such as to prevent a partner deriving advantage from his own misconduct by compelling his co-partner to submit either to a continued wrong or to a dissolution. In all such cases the principle is that, where justice requires all the dealings of the partnership should be finally determined, the Court will not allow a partial account to be taken but that when the basis of the claim is unconnected with the partnership business or is only very remotely connected therewith, an action is maintainable when no injustice is caused by dealing with one claim separately. Each case must depend on its special circumstances and upon whether justice can be done without taking an account. English and Indian case-law referred to.

Appeal against the decree of the Court of the Additional Subordinate Judge of Ramnad at Madura in O. S. No. 35 of 1919 (O. S. No. 79 of 1919 on the file of the Court of the Subordinate Judge of Ramnad).

K. Bhashyam Aiyangar and *V. C. Veeraraghavachariar* for appellants.

A. Krishnaswami Aiyar and *M. Subbaroya Aiyar* for respondents.

The Court delivered the following

Phillips, J.

JUDGMENTS :—*Phillips, J.* :—Plaintiffs and one Muthuvairava Pillai were partners in a business carried on in Erode and other places. The 1st defendant is father of the late Muthuvairava Pillai, defendants 2 and 3 are his sons and 4th defendant is his brother's widow. Plaintiffs have brought this suit against the defendants as legal representatives of the deceased Muthuvairava Pillai alleging that the latter and the defendants were members of a joint Hindu family. The suit is to recover certain sums of money due to the partnership firm by the deceased partner, and in the original plaint there were four such items. The first and the third are said to be sums borrowed by the deceased on his own account and repaid out of partnership money ; the second item is the amount said to have been overdrawn by the deceased and therefore due to the firm ; the fourth item is also an amount relating to his drawings on account of his salary less the profit which is due to him.

The accounts of the partnership, which became dissolved by the death of Muthuvairava Pillai, have never been taken

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and, consequently, the defendants pleaded that this suit was not maintainable, as plaintiffs were not suing for an account. Subsequently, the plaintiffs withdrew their claim to the fourth item on the ground that that item was disputed and was based on a different cause of action to the other three. Defendants again opposed this amendment and repeated their plea that the suit should be for the taking of accounts. This item which has been withdrawn would, to a certain extent, necessitate taking of an account in order to ascertain whether the amount credited to the deceased as his share of the profits was correct; but nevertheless the Subordinate Judge allowed the amendment and proceeded to trial holding that the suit is maintainable. After taking evidence on the merits of the case he has decreed plaintiffs' suit in respect of the three items which still remained in the plaint. The defendants now appeal and again plead that the suit as framed is not maintainable, and this has been argued as a preliminary point without going into the merits of the case.

It was a very well-established rule in English Law that Courts would not interfere between one partner and another unless it was for the purpose of dissolving the partnership or, if it was dissolved, of finally winding up its affairs. This rule has in later years been considerably relaxed because it was found to work hardship in certain cases and in the result Courts have interfered in order to prevent a partner deriving advantage from his own misconduct and have not insisted on the other partners submitting either to continuance of the wrong or to a dissolution ; but the reason for the relaxation of the rule has been explained in Lord Lindley on *Partnership*, 8th Edition, page 630 as follows :—"The first question (namely, when can an action be maintained between partners without taking a general account of all the partnership dealings and transactions) can only be answered generally by saying that each case must depend upon its own circumstances and upon whether justice can really be done without taking such an account." In the present case, the defendants state that an account should have been taken in order that the amount due by, or to, Muthuvairava Pillai might be finally determined. Plaintiffs answer to this is that they are not asking for the taking of accounts because the items specified by them as being due by the deceased are moneys which were not brought into the partnership accounts but were taken by the deceased for his

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own purposes. So far as item 2 is concerned, this is clearly wrong, for it represents the amount of drawings by the deceased partner, drawings which he was entitled to make, for as a partner he was entitled to use as much of the partnership money as would represent his share of the profits. Similarly, as regards the other two items, I do not think that they can be treated as sums of money entirely unconnected with the partnership business. They represent two sums of Rs. 10,000 and Rs. 3,000 respectively, borrowed by the deceased in the name of the partnership, and the repayment of these loans is shown in the partnership accounts. The question whether the firm received the benefit of these two sums of money is one which has to be determined on a consideration of the evidence ; and I may say here that, if really the money was not credited to the partnership at all, it is extraordinary that Muthuvairava Pillai should have shown the repayment of the money in the partnership accounts, thus clearly proving his own misappropriation. However that may be, I think that these items cannot be treated separately from the partnership business and I do not think that the cases relied upon by the respondents are any authority to the contrary, *i. e., Cross* v. *Cheshire* (1), *Smith* v. *Barrow* (2), *Bedford* v. *Brutton* (3) and *Ex parte Younge* (4). In the first of these cases [*Cross* v. *Cheshire* (1)] the suit was held to be maintainable because it was for an amount which had been decreed against the partnership in respect of the private debt of one of the partners; the second case [*Smith* v. *Barrow* (2).] is somewhat similar, for it was a suit by one partner against another to recover his own money which had by mistake been put into the partnership funds. Again in *Bedford* v. *Brutton* (3) a member of a company was allowed to sue for rent due to himself personally as against the trustees for the company. The fourth case [in *Ex parte Younge* (4)] does not refer to a suit but to Bankruptcy proceedings. In *Smith* v. *Barrow* (2) the suit was allowed, but with regard to the further claim for a sum of £30 which was due to the partnership, it was held that the action could not be maintained. In *Bedford* v. *Brutton* (3) it was pointed out by Tindal, C. J., that if the action were virtually and substantially an action on covenant, brought by the assignees of one partner,

1. 7 Ex R 43.
2. 100 E R 256 : 2 T R 476.
3. 131 E R 1171 ; 1 Bing N C 399.
4. 13 R R 135.

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who has become bankrupt, against three of his partners, to recover damages against them, to which the plaintiff himself must be contributory if he succeeds, the action would not be maintainable. And we may observe that in all these cases the principle is that, where justice requires that all the dealings of the partnership should be finally determined, the Courts will not allow a partial account to be taken but that when the basis of the claim is unconnected with the partnership business, or is only very remotely connected therewith, an action is maintainable, when no injustice is caused by dealing with this one claim separately. As instances of the former class of case I may refer to *Lakshmana Chetty* v. *Nagappa Chetty* (5), *Annamalai Chetty* v. *Annamalai Chetty* (6) and *Godhanram* v. *Jaharmull Puglia* (7) and to *Karri Venkata Reddy* v. *Kollu Narasayya* (8) and *Sunkara Ratha Doss* v. *Epari Kopilo* (9) as instances of the latter. As pointed out in Lindley on *Partnership,* each case must depend on its own special circumstances and upon whether justice can be done without taking an account.

In the present suit, the defendants have no personal knowledge of the transactions and business of the partnership, but they are entitled to have all the questions at issue determined by taking of accounts ; for it may well be that, if accounts are taken amounts will be found due by the partnership to the deceased which must be set off against the items now claimed separately. It is possible also that in addition to the items claimed separately, plaintiffs may be entitled to recover a further amount ; in either case, justice will not be done between all the parties unless their claims are determined by final settlement of accounts. Even if the items claimed by plaintiffs were really items criminally misappropriated by the deceased, their action would be an action *in tort* and they would only have the right to recover any damages for which the deceaesd is liable out of his assets in the hands of the defendants. If, on the other hand, some money is due by the firm to the deceased, the defendants are entitled to have the benefit of that amount. It is impossible therefore to do justice to all the parties without taking a final account of the partnership.

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5. (1917) 34 M L J 408.
6. (1919) 10 L W 67.
7. (1912) I L R 40 C 335.
8. (1908) I L R 32 M 76 : 19 M L J 10.
9. (1916) 49 I C 191.

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Plaintiffs have definitely, and somewhat obstinately, declined to alter their suit into one for taking of accounts and have proceeded to trial on the basis that this was not necessary. During the hearing of the appeal, however, Mr. A. Krishnaswami Aiyar for the plaintiffs made a request that the amendment of the plaint may now be allowed for apparently plaintiffs are afraid that a suit for account would now be barred by limitation. Inasmuch as the plaintiffs have established their claim in the Lower Court to certain items I think it is equitable that an account should be taken but as they obstinately refused to make any such amendment of their plaint in the earlier stages of the trial, they are responsible for all the costs that have hitherto been incurred. I would therefore allow the amendment to be made on condition that plaintiffs pay all the defendants' costs of the original trial and in this Court within two months. If that is done, the suit will be remanded for fresh disposal after amendment of the plaint but in default the suit will be dismissed with costs throughout.

Odgers, J.

Odgers, J. :—The facts have been fully set out by my learned brother. I agree, but I will add a few words on my view of the legal point which has been raised, *viz.*, whether the Subordinate Judge was right in his view that the adjudication of the three items claimed in the suit does not necessitate a taking of the entire accounts of the partnership. In considering this question it is important to remember that the partnership during the subsistence of which the various acts alleged against Muthuvairava Pillai took place was dissolved before suit by his death. There is also no question that if a partnership account were taken certain amounts would be found due to the deceased partner, Muthuvairava Pillai who had 1|16th or 1|17th share in the partnership and who would not be liable to his partners in any event for more than 15|16 or 16|17ths of the amounts in question. The present defendants are the father, sons, and brother's widow of Muthuvairava Pillai. The rule laid down in *Karri Venkata Reddi* v. *Kollu Narasayya* (8) is that the Court is to determine under what circumstances it would be equitable to order a partial account and that if the account sought for does not involve the taking of a general account the Court will as a rule give the relief asked for and will refuse to interfere only in those cases in which a partial account would work injustice to the other

8. (1908) I L R 32 M 76 : 19 M L J 10.

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partner. In *Lakshmana Chetti* v. *Nagappa Chetti* (5) it was said the plaintiff was practically suing himself and his partner and that as he sought to establish liability against the defendants on the basis of accounts and had not asked for them the suit would not lie. In *Godhanram* v. *Jaharmull Puglia* (7) in a suit by a principal against an agent it was held that plaintiff could not be permitted to select capriciously a single transaction and claim the fruits thereof without the adjustment of the rights and liabilities of the parties in relation to other transactions. Lord Lindley in his work on *Partnership* (8th Edition), p. 539, says that the old rule was that the Court would not decree a partnership account unless a dissolution was sought on the ground that formerly Courts of Equity were adverse to any interference between one partner and another. This rule has been however relaxed in more modern practice when justice demands the Courts' intervention to prevent some definite wrong or redress some particular grievance. The Courts will not now, if it is possible to avoid it, allow a partner to derive advantage from his own misconduct by compelling his co-partner to submit either to a continued wrong or to a dissolution. It is argued for the respondent that the present case comes within the modern rule of exceptions, which rule, be it noted, is expressly said to be designed to prevent the necessity of suing for a dissolution. Here dissolution has already taken place. The cases cited by Mr. A. Krishnaswami Aiyar for the respondents are the following :—*Cross* v. *Cheshire* (1), *Smith* v. *Barrow* (2), *Ex parte Younge* (4) and *Bedford* v. *Brutton* (3). In *Cross* v. *Cheshire* (1) it was held that if one of the partners is called upon by the act of the other to pay his private debt, the former may recover the money so paid by an *assumpsit* for money paid to the use of the other, as the defaulter had admitted that the debt was his own and *not connected with the partnership accounts*. (The italics are mine.)

In *Smith* v. *Barrow* (2) it was held that where money was wrongly carried to the partnership accounts when it was really received by one partner for the separate use of the other, an action may be maintained. This is the converse case to *Cross* v. *Cheshire* (1).

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1. 7 Ex R 43.
2. 100 E R 256 : 2 T R 476.
3. 131 E R 1171 : 1 Bing N C 399.
4. 13 R R 135.
5. (1917) 34 M L J 408,
7. (1912) I L R 40 C 335 at 340,

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Ex parte Younge(4) was the case of one partner abstracting the joint property of the partnership by fraud. It was held that the partnership might prove against his separate estate for that wrong. The case was in bankruptcy. *Bedford* v. *Brutton* (3) proceeded on the express terms of the deed and can have no bearing on the present case.

The English cases quoted all refer to subsisting partnerships and as stated form exceptions to the general rule in order to preserve the partnership and prevent dissolution. In my opinion they do not apply to the present case. In my opinion justice cannot be effectively done here without taking a regular partnership account which moreover will be essential at some time or another. It is therefore clear to me that the Subordinate Judge ought to have held the suit not maintainable without a prayer for an account. A fresh suit for that purpose would now be barred under Art. 106, Limitation Act, as Muthuvairava Pillai died in 1919. The plaintiffs had two opportunities of amending their plaint and did not take advantage of either. I think, under the circumstances, though I feel it is an indulgence, that on condition that they pay all the costs incurred up to date, they may be allowed to amend at this stage. I agree with the order proposed as to the conditions under which amendment should be allowed.

T. S. V. *Amendment ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

C. Janardhanan and another ... *Petitioners** (*Respondents* 1 *and* 2)

v.

N. M. Verghese and two others... *Respondents* (*Petitioner-Respondents* 3 *and* 4).

Janardhanan v. Verghese.

Civil Procedure Code, S. 115—Election petition—Preliminary objections to maintainability of—Order of Lower Court overruling objections and directing enquiry—Revision—Interference by High Court—Electoral Roll—Finality of, in proceedings to contest election—Madras Election Enquiry Rules, Rr. 8 and 11—Scope of.

Where a petition was put in Court to set aside the election of a successful candidate in a ward of a Municipality, it was contended that the objection

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*C R P Nos. 246 and 523 of 1924 and
C M P No. 1293 of 1924. 25th November, 1924.

3. 131 E R 1171 : 1 Bing N C 399.
4. 13 R R 135.

Janardhanan v. Verghese.

petition did not disclose any grounds on which an enquiry could be held under R. 11 of the Election Enquiry Rules framed by the Local Government. The Court passed an order deciding that the petition disclosed reasons for going into evidence and for holding an election enquiry. On revision to the High Court, *held*, that the order of the Court below, though interlocutory, was open to revision by the High Court. It is proper that the High Court should decide whether the petition disclosed any grounds for holding an enquiry and if it did not, the High Court should say so at once and stop the enquiry at the outset. If the election petition did not disclose any ground for an enquiry, the Lower Court would be exercising a jurisdiction not vested in it by holding such an enquiry.

Unless the objections raised in an election petition come under one or other of the three sub-clauses of R. 11 of the Election Enquiry Rules, the election petition should be rejected *in limine*. It is not a valid objection to an election that the successful candidate's name had been wrongly put on the electoral roll because he had not paid taxes or was resident outside the Municipality. The electoral roll, having been finally settled, must be taken as final for the purposes of all "election proceedings" including an enquiry by the Court into the validity of an election. *Palaniswami Pillai* v. *Srinivasaranqachariar*, 47 M L J 795 followed.

A complaint of irregularity against the Chairman or the revising authority in the matter of preparing the final electoral roll would not, even if true, affect the election of the successful candidate.

C. R. P. No. 246 *of* 1924.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Cochin in O. P. No. 2 of 1923.

C. M. P. No. 1293 *of* 1924.

Petition praying that the High Court may direct stay of further proceedings in O. P. No. 2 of 1923 on the file of the Court of the Subordinate Judge of Cochin pending disposal of the said C. R. P. No. 246 of 1924.

T. M. Krishnaswami Aiyar and *B. Pocker* for petitioners.

T. S. Viswanatha Aiyar for respondents.

The Court delivered the following

JUDGMENT :—These are two applications under S. 115 of the Code of Civil Procedure to revise the common order passed by the Subordinate Judge of Cochin on two applications put in by the respondents against the petitioners who were declared to have been elected in two wards in the town of Cochin to have their elections set aside. The petitioners objected before the Subordinate Judge that the petitions filed against them did not disclose any grounds on which an enquiry could be held under R. 11 of the Election Enquiry Rules

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framed by the Governor in Council, Madras, and published in the *Fort St. George Gazette*, dated 30th November, 1920; and they asked therefore that the petitions should be dismissed without any enquiry. The Subordinate Judge, however, pronounced a common order in both cases deciding that the petitions did disclose reasons for going into evidence and for holding an election enquiry. It is against that order that these revision petitions have been filed in this Court.

A preliminary objection has been taken by the learned vakil for the respondent before me that I should not interfere under S. 115 of the Code of Civil Procedure as the order of the Subordinate Judge was an order passed in the course of the election enquiry and that this Court should not interfere with such interlocutory orders. I am not able to support this objection, because it seems to me that if as the learned vakil for the petitioners argues the election petitions did not disclose any ground for an enquiry, the Subordinate Judge will be exercising a jurisdiction not vested in him by holding such an enquiry and to hold it will simply lead to waste of time of the Court and of the parties. In such a case it seems to me that it is but right and proper that this Court should decide whether the petitions disclose any grounds for holding an enquiry and, if they do not, this Court should say so at once and stop the enquiry at the very outset. The question then which has to be considered is whether these election petitions filed disclose any ground for an election enquiry. Rule II of the rules already referred to says what the circumstances are under which the election of a candidate can be declared to be void. There are three sub-clauses to the rule (*a*), (*b*) and (*c*); and (*b*) has four sub-divisions. Unless the objections raised in the election petitions can be brought under one or other of these clauses it is clear that the election petitions should be rejected *in limine*. The only point taken in the petitions in this case is that the candidates who have been declared elected, were wrongly put upon the electoral roll because they had not paid their taxes and that one of them was not a resident within the Municipality. It is contended that on account of these objections these candidates should not have been put on the electoral roll. With regard to one of the men these objections were taken before the revising authority after the preliminary electoral roll had been published, but that authority overruled the objections and continued his name

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on the roll. As regards the two others no objections were taken before the revising authority and their names appeared on the roll as those of fit and proper persons to vote and to stand as candidates for election. R. 8 (*a*) of the rules for the preparation of the electoral rolls makes it quite clear, as the Subordinate Judge himself has noted, that the electoral roll when finally settled must be taken as final for the purposes of election proceedings. It says, " No failure to observe the dates prescribed in these rules or to observe other directions regarding the preparation of the electoral roll shall entitle any one to question the validity and conclusiveness of the registers in election proceedings." To get rid of the effect of this rule which gives finality to the electoral roll it was argued that the word " proceedings " applied only to proceedings taken for election and that as soon as the election was over and an election enquiry was started, it was no longer an election proceedings ; in other words, it was contended that " election proceedings" do not include an election enquiry at all. This argument was accepted by the Subordinate Judge. But it seems to me it is clearly erroneous. " Election proceedings " include all proceedings relating to an election until it is finally determined who the candidate is who has been properly elected. It thus includes an election enquiry. This is the view that has been taken by this Court in a recent case, *Palanisami Pillai* v. *Srinivasarangachariar* (1) and I respectfully agree with it. It seems to me that to hold otherwise will lead to an absurdity, for there is no object whatsoever in making the electoral roll final for the purpose of election if the whole thing can be reopened by making it possible for a candidate who has been disappointed to put in a petition and get it decided by a Court whether the electoral roll was a proper roll or not. The very object of making the electoral roll final is to avoid the difficulty of a candidate standing for election who can afterwards be objected to as disqualified or canvassing for votes from people who might afterwards be declared to be improper voters. For the purposes of an election a roll has to be settled and after that is settled, it must be taken as settled for all purposes of the election up to the very end till it is finally declared who the properly elected candidate is.

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1. (1924) 47 M L J 795.

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It was attempted to be argued that R. 8 (*a*) would not apply to a case where a candidate has failed to pay his taxes, because it was said that the rule, which lays down that the name of a person who has not paid taxes shall not be included in the electoral roll, is a provision in the Act itself in S. 46, and that R. 8 (*e*) does not deal with objections based on the provisions of the Act. There is however nothing in the wording of R. 8 (*e*) to exclude any such objection. "Failure to observe other directions" mentioned in it is not confined to directions in the rules but include directions in the Act as well.

It is also urged before me that the allegations in the petitions would come within cl. (*a*) of R. II of the rules of 30th November, 1920. That clause says, "If in the opinion of the Judge the returned candidate, his agent, or any other person with the connivance of such candidate or agent, has committed or abetted the commission of any one of the offences described in Ss. 52 to 58 of the Madras District Municipalities Act, the election of the returned candidate shall be void." I have looked carefully into the allegations in the petitions filed by the objectors in these two cases but I can find none there of any offence having been committed under S. 52 by the candidates or their agents. As regards the allegation that the names of candidates were improperly retained on the rolls even though taxes were not paid, the objection is to the conduct of the revising authority and of the Municipal Chairman. It is not an allegation against the candidate of having committed any offence. It is not even an allegation against the Chairman or the revising authority which would come under S. 52 ; but even if it did, an allegation against the Chairman or the revising authority would not affect the candidate under R. 11 (*a*). So far as I can see, there is no allegation in the petitions filed by the objectors in the Lower Court which requires an enquiry to be held ; the petitions should therefore have been dismissed.

I allow the revision petitions and dismiss the election petitions with costs in this and the Lower Courts.

Vakil's fee Rs. 50 in each petition.

A. V. V. *Revision Petitions allowed : Election Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Marimbi ... *Appellant** (*Plaintiff*)

v.

Kakani Sundar Rao, minor, by guardian Desiraju Venkayamma and another... *Respondents* (*Defendants* 2 *and* 3).

Marimbi *v.* Sundar Rao.

Mortgage—Attestation—Proof of—Evidence of one of the attestors—Sufficiency of.

Where one of two attestors to a mortgage deed was dead and the other attestor who was examined as a witness proved not merely his own signature and attestation but also the signature of the other attestor who had signed as such, *held*, that the mortgage document was duly proved.

Gangayya v. *Subbamma*, 41 M L J 305 distinguished.

Second Appeal against the decree of the Court of the Subordinate Judge of Guntur in A. S. No. 44 of 1921, preferred against the decree of the Court of the Second Additional District Munsif of Guntur in O. S. No. 78 of 1920 (O. S. No. 1788 of 1919 on the file of the Court of the Principal District Munsif of Guntur).

B. Somayya for appellant.

P. Satyanarayana for respondents.

The Court delivered the following

JUDGMENT :—Assuming that calling one attestor and merely proving the execution of the document and his attestation is not enough and that the fact of attestation of two witnesses has to be proved, we think the requirements of law are satisfied in this case.

D. W. 1 in this case, in the chief examination, proves his own attestation and the execution. He supplements his answer in the chief examination by his answer in the re-examination (which was not objected to) by proving the signature of the other attestor and the writer. The other attestor whose signature is proved is dead, but described himself on the document as an attestor. We must presume, now that his signature is proved, that he knew the law and described himself as an attestor because he saw the executant sign the document. This presumption can, of course, be rebutted by further cross-examination. The plaintiff did not care to

*S A No. 1173 of 1922. 18th November, 1924.

Marimbi v. Sundar Rao.

ask for permission to further cross-examine the witness, for obvious reasons. Under these circumstances we must hold that the parties were content to leave the witness with the understanding that the other attestor's signature as an attestor has been proved. In *Thanneru Gangayya* v. *Bommadevara Subbamma and others* (1) only the execution and the attestation of the attestor who has been called were proved and nothing was said about the other attestor. We therefore hold Ex. II has been properly proved.

The only other point argued before us is that the plaintiff was a *purdanashin* lady. This has been found against by the Courts below. The Second Appeal fails and is dismissed with costs of first respondent.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

V. Janakiramayya ... *Petitioner* (Complainant)*

v.

Nimmagadda Brahmayya ... *Accused.*

Janakiramayya v. Brahmayya.

Limitation Act, S. 5—Criminal appeal—Presentation out of time—No sufficient cause for excusing delay—Power of Court to accept appeal—Procedure—Acquittal—Interference in revision—When justified.

Under S. 5, Limitation Act, a Criminal Appellate Court has power to excuse delay and admit a time-barred appeal. But if it is not satisfied that the appellant had sufficient reason for not preferring the appeal in time, it has no power to extend the period and admit the appeal. Its proper procedure should be to move the High Court to exercise powers of revision.

Where, however, such a time-barred appeal is admitted and the appellant acquitted, the High Court will not interfere in revision unless there is a gross miscarriage of justice which ought to be remedied.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India Act, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Bezwada in Cr. A. No. 58 of 1923, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Bezwada in C. C. No. 565 of 1923.

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*Cr R C No. 307 of 1924
(Cr R P No. 258 of 1924). 5th November, 1924.

1. (1921) 41 M L J 305.

Janaki-ramayya v Brahmayya.

V. Suryanarayana for petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

Wallace, J.

ORDERS :—*Wallace, J.* :—The first point raised in this petition is whether the Lower Appellate Court had jurisdiction to admit a criminal appeal which was out of time, that Court itself finding that the appellant had not shown convincing reasons for not presenting it in time. The provision of law applicable is S. 5 of the Indian Limitation Act, and under that provision the Court cannot extend the time unless it is satisfied that the appellant had sufficient cause for not preferring the appeal in time. The Lower Appellate Court was not so satisfied and therefore had no authority to extend the period and admit the appeal. Its proper procedure would have been to move this Court to exercise its powers of revision.

As to whether we should now interfere and reverse the acquittal, it is a question of whether there has been any gross miscarriage of justice which ought to be remedied. I cannot hold that there is any such question. The appellant had been convicted of theft for removing earth from a village site, said to belong to the Zamindar of South Vallur Estate. The village site is an open vacant place, used as a latrine, not very obviously in the physical possession of any one. To say that the site belongs to the Zamindar as village site is not the same thing as saying that the earth in it is all his private perquisite, which he can dispose of for his own private profit. The intention to cause wrongful loss to the Zamindar, or the contention that wrongful loss has been in fact caused to the Zamindar, has not been clearly made out. The matter is more of a civil nature than criminal.

I would therefore refuse to interfere and dismiss this petition.

Madhavan Nair, J.

Madhavan Nair, J. :—I agree that this petition should be dismissed. I would like to add that, in view of S. 5 of the Limitation Act, it cannot be contended that the Appellate Magistrate has no power to excuse the delay and admit the time-barred criminal appeal. A criminal appeal filed after the expiry of the prescribed period of limitation may be admitted if the Court is satisfied that the appellant had sufficient reason for not preferring the appeal within the period of limi-

Janakiramayya v Brahmayya.

Madhavan Nair, J.

tation [see *Surta Singh* v. *The Crown* (1) and *Rahman* v. *The Crown* (2).]. In the case before us the Lower Appellate Court was not satisfied from the appellant's affidavit that there was sufficient reason to excuse the delay. It had, therefore, no power to extend the period and admit the appeal. As pointed out by my learned brother, its proper procedure would have been to move this Court to exercise its powers of revision.

T. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Karpaga Nidhi, Ltd., Coimbatore, by
Secretary, Rangia Goundar ... *Petitioner** (*Petitioner*)
v.
Vania Vilasa Nidhi, Ltd., by Secretary,
Nammalwar Chettiar ... *Respondent* (*Respondent*)

Karpaga Nidhi, Ltd. v. Vania Vilas Nidhi, Ltd.

Civil Procedure Code, S. 73—Application for rateable distribution—Order dismissing, on misconception of provisions of S. 73—Revision against—Interference in.

An application for rateable distribution was dismissed by the Court below, it being of opinion that it had no jurisdiction to order payment out as the application was presented subsequent to the realization of the assets. The Court below overlooked the provisions in S. 73, Civil Procedure Code, that every person that had applied to the Court previous to the realization of assets for execution of the decree obtained by him was entitled to come in under that section and have rateable distribution. When the petition was filed no payments had been ordered to be made.

Held, that the order of the Court below was made on the misconception that an application must have been made by petitioner before distribution of assets and that it was liable to be set aside in revision.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Principal District Munsif of Coimbatore in C. M. P. No. 1008 of 1924 in O. S. No. 1257 of 1922.

S. Nagaraja Aiyar for petitioner.

P. Markandeyalu for respondent.

The Court delivered the following

JUDGMENT :—I think this petition ought to be allowed. The District Munsif in the Court below was apparently under the impression that he had no jurisdiction to order payment

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*C R P No. 632 of 1924. 1st December, 1924.

1. (1920) I L R 1 Lah 508. 2. (1923) 5 L L J 477.

Karpaga Nidhi, Ltd. v. Vania Vilas Nidhi, Ltd.

out on the application of the petitioner for the reason th his application for rateable distribution was presented subs quent to the realization of the assets. The learned Distri Munsif obviously overlooked the provisions in S. 73, Ci Procedure Code, that every person that had applied to tl Court previous to the realization of assets for execution the decree obtained by him was entitled to come in under th section and have rateable distribution. The learned val for the respondent has drawn my attention to two decisio of this Court. The first is the one reported in *Somasundara Chetti* v. *Tirunarayana Pillai* (1). In that this Court refus to interfere because it was of opinion that a regular suit w in the circumstances of that case the more efficacious reme having regard to the fact that the rights of parties not befo this Court might conceivably be affected by any order th may be made behind their backs. There is no such difficul here because in the present case when the petition was fil no payments had been ordered to be made, and I do not nc propose to make the order finally. The other case cited l the learned vakil for the respondent is that reported *Muthiah Chetty* v. *Alagappa Chetty* (2). There are ce tain observations in the course of the judgment in that de sion to the effect that if an enquiry should be found necessa for determining the rights of particular judgment-debtors the fund applied for to be distributed the appropriate proc dure would be not under S. 73 but in a regular suit. No su enquiry is or could at all be necessary in this case, becau both the judgment-debtors in the suit in which the proper was sold were judgment-debtors also in the suit in which tl decree was obtained for which rateable distributic is now applied for. Both of them being liable for the enti decree of the petitioner no enquiry into any share or intere of particular judgment-debtors would be necessary. Tl Lower Court having dismissed the petitioner's application c the misconception that an application must have been made l him before distribution of assets the order should be set asid and I hereby set aside the order and remand the applicatic to the Lower Court for being heard if necessary after noti to all the parties concerned. The respondent will pay tl petitioner's costs of this Civil Revision Petition.

A. S. V. *Order set aside.*

1. (1914) M W N 738. 2. 47 I C 296.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Bachu Chinna Nagappa ... *Appellant** (*1st defendant*)

v.

Bachu Naranappa and another... *Respondents* (*Plaintiff and 2nd defendant*).

Nagappa *v.* Naranappa.

Hindu Law—Widow—Alienation—Suit for husband's share of property—Compromise—Acceptance of joint status and items of property for herself—How far binding on reversioners—Bona fides—*Tests of.*

A Hindu widow sued for recovery of her husband's share of the family properties alleging that he had become divided from the rest of the family. She compromised the suit, admitting that there was no division and accepting some lands absolutely for herself after giving up the rest of the property claimed. In a suit by the reversioner challenging the transaction, it was proved that the husband had become divided and that the compromise was not *bona fide* but the result of collusion. *Held,* the compromise amounted to an alienation and was not binding on the reversioners.

In all such cases the questions whether the compromise by the widow was *bone fide* and would amount to an alienation would depend on the true facts as found in the later suit, on the terms obtained by the widow, whether she was reserving any benefit for herself personally and whether the true facts were known to her. Obtaining a benefit for herself personally would amount to good proof of want of *bona fides.*

Second Appeal against the decree of the District Court of Anantapur in Appeal No. 80 of 1921 preferred against the decree of the Court of the District Munsif of Anantapur in O. S. No. 115 of 1920.

A. Venkatrayaliah and *L. Venkatanarasiah* for appellant.

B. Somayya for respondents.

The Court delivered the following

JUDGMENT :—The 2nd defendant sued the 1st defendant for recovery of her husband's share of the family properties alleging that her husband and 1st defendant were divided. The Original Suit No. 708 of 1919 on the file of the Court of the District Munsif of Penukonda was compromised by which she admitted there was no division, accepted three acres and odd absolutely for herself, and gave up the rest of the property moveable and immoveable. The Courts below found that the compromise was binding on the parties to it and no fraud on the 2nd defendant (the then plaintiff) has been proved but

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*Second Appeal No. 377 of 1922. 10th December, 1924.

Nagappa v. Naranappa

that the 2nd defendant and the 1st defendant colluded and entered into the compromise, by which she obtained a benefit personal for helsef and it is not binding on the plaintiff who is the reversioner. In all such cases the questions (1) whether the compromise of the widow is *bona fide,* and (2) whether the compromise amounts to an alienation depend on the true facts as found in the later suit on the terms obtained by the widow in the compromise, *i. e.,* whether she was surrendering any portion of her rights as now ascertained with reference to the facts and how much, whether she was reserving any benefit for herself personally as opposed to the estate, and lastly, whether the real facts were known to her. That she obtained a benefit peculiar to herself should be a good proof of want of *bona fides.* [See *Imrit Konwar* v. *Roop Narain Singh* (1) distinguished ; *Ramasumran* v. *Shyam Kumari* (2)].

In the first place as to the three acres obtained by the widow it is clear that the compromise in this case cannot be upheld on the footing of a family settlement for the widow did not act for herself and the enlargement of her personal estate cannot bind the reversioner. The antecedent title, with reference to which she got the three and odd acres, was that of her husband and plaintiff still remains a reversioner for that property [*Khunni Lal* v. *Gobind Krishna Narain* (3)].

Coming to the rest, the Courts below have found that the facts are such that the compromise could not be *bona fide.* The 2nd defendant went to Court on the footing that there was a division but abandoned it for no apparent reason whereas the division is now completely established and must have been known to her [see *Sant Kumar* v. *Deo Saran* (4)]. The decision in *Madan Lal* v. *Chuttan Singh* (5) is a decision on the facts. In *Bihari Lal* v. *Dand Husain* (6) the Lower Appellate Court found there was a *bona fide* settlement and the finding was accepted by the High Court. In *Kodakkarai Nadan* v. *Nadakkannu Nadan* (7) there was no finding when the case came up originally before the High Court. A finding on the question whether the compromise was *bona fide* was called for.

1. (1880) 6 C L R 76.
2. (1922) 1 Pat 741 at 747 : 44 M L J 751 (P C).
3. (1911) I L R 33 A 356 : 21 M L J 645 (P C).
4. (1886) I L R 8 A 365.
5. (1912) 10 A L J 101.
6. (1913) I L R 35 A 242.
7. (1921) M W N 342.

Nagappa v. Naranappa.

The District Judge found it was *bona fide* and the finding was accepted by the High Court. As to *Kambinayani Timmaji* v. *Kambinayani Subbaraju* (8), it is enough to observe that *Imrit Konwar* v. *Roop Narain Singh* (1) and *Sant Kumar* v. *Deo Saran* (4) were concurred and that I cannot agree with all other observations in it. It seems to me that whenever a compromise by which the widow surrenders property to which she is entitled on the true facts has been found to be not *bona fide*, it amounts to an alienation.

It may be that in *Kambinayani Timmaji* v. *Kambinayani Subbaraju* (8) the compromise was *bona fide*.

The Second Appeal is dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

A. Rama Rao ... *Appellant** (*Plaintiff*)

v.

A. Thimmappa ... *Respondent* (*Defendant*).

Rama Rao v. Thimmappa.

Lease—Construction—Kayamgeni Chit—Termination of lease—Lessor's right of—Compensation to tenant for value of improvements—Payment of, if condition precedent to landlord's right to re-enter.

A lease called "Kayamgeni Chit" began with the words "Kayamgeni Chit executed on ......;" and its counter-part was similar in terms. In the body of the lease deed there was a recital that the lessee was to enjoy from generation to generation. But in the end of the document there was a clause "when we require the property you should take half the value of the improvements for the trees planted by us and full value for the plants planted by you out of the value fixed by wise persons for the improvements and surrender the property to us." There was, however, nothing in the body of the document itself to show that the landlord contracted with the lessee that the latter should have a perpetual or a permanent lease without the right of re-entry on the part of the landlord.

In a suit by the landlord for possession of the land demised on the ground that he had terminated the lease, *held* (1) that, construing the lease deed as a whole, the intention of the parties was that the land leased should be surrendered whenever required by the landlord; (2) that the last clause in the deed entitling the landlord to terminate the lease was not bad either for remoteness or because it was repugnant to the rest of the document; and (3) that the

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*Second Appeal No. 610 of 1922. 3rd November, 1924.

1. (1880) 6 C L R 76. 4. (1886) I L R 8 A 365.

8. (1910) I L R 33 M 473 : 20 M L J 204.

Rama Rao v. Thimmappa.

landlord was entitled to re-enter only on paying compensation for the value of the buildings and other improvements effected by the tenant.

Second Appeal against the decree of the District Court of South Kanara in A. S. No. 181 of 1921, preferred against the decree of the Court of the District Munsif of Mangalore in O. S. No. 122 of 1919.

B. Sitarama Rao for appellant.

Venkatachalla Aiyar for *C. V. Anantakrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff sues for possession of the plaint land on the ground that he terminated the lease granted to the defendant. The District Munsif gave a decree in favour of the plaintiff, but the District Judge dismissed the suit on the ground that the clause with regard to the right of re-entry was repugnant to the nature of the document.

Mr. Sitarama Rao's contention on behalf of the appellant is that though the lease is called "Kayamgeni Chit," yet the body of the document shows that it was not intended by the lessor that the lease should be permanent. No doubt the document is headed "Kayamgeni Chit" and begins with the words "Kayamgeni Chit executed on the 10th Pushuabahula," etc., and the counterpart is similar in terms and in the body of the document there is a recital that the lessee is to enjoy from generation to generation. But in the end of the document there is a clause " When we require the property you should take half the value of the improvements for the trees planted by us and full value for the plants planted by you out of the value fixed by wise persons for the improvements and surrender the property to us." Does this clause give the landlord the right to terminate the lease ?

For the respondent, Mr. Venkatachalla Aiyar who appears for Mr. Anantakrishna Aiyar contends that the document should be construed as containing the terms of a permanent lease. He relies upon the use of the term "Kayamgeni Chit " and also upon the clause that the lessee was to enjoy the land from generation to generation and upon the fact that the rent is a fixed rent. No doubt in interpreting the document, in the absence of clear words to the contrary, these things would be of great value, namely, the nature of the terms used for the description of the document, the clause with re-

gard to the enjoyment of the property from generation to generation and the rent being a fixed rent. But in a lease of this kind the Court has to see what is the contract entered into by the lessor with the lessee. It is open to the lessee to surrender the land leased to him and it is also open to the lessor to contract with the lessee that the land should be available for him whenever he requires it. The mere use of the word "Kayamgeni Chit" would not take away the force of the recital in the document that the lessee should surrender the land whenever required by the landlord. In construing a document of this kind the whole of the document should be taken into consideration. If there are clear words in the body of the document that the landlord was not to enter upon the land at any time, then the clause in question would be considered repugnant to the general tenor of the document. But so far as I can see there is nothing in the body of the document itself to show that the landlord contracted with the lessee that the lessee should have a perpetual or a permanent lease without the right of re-entry on the part of the landlord.

For the respondent several cases were quoted. But I think they are not applicable to the case of a lease of this kind. For instance the case in *In re Dugdut, Dugdab* v. *Dugdab* (1) was a case of bequest ; and the Court held that the legatee took an absolute interest under the gift, and that the attempted executory gift over was void for repugnancy.

It is also contended by Mr. Venkatachalla Aiyar that this clause is bad for remoteness. I fail to see how it can be said that this clause is bad for remoteness. As I have observed it is open to two persons to contract to do or not to do a certain thing, the only question is whether the contract is one which offends against any rule of law. The decision in *Maharaj Bahadur Singh* v. *Balchand Chowdhury* (2) does not apply to this case. In that case a body of Jains were given by a Rajah the right to build on a hill belonging to him whenever they wanted a place for their people. The Privy Council held that there was no covenant running with the land; and the observation at p. 166 is, "Further, if the case be regarded in another light—namely an agreement to grant in the future whatever land might be selected as a site for a temple—as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is

1. 38 Ch D 176. 2. (1920) 6 Pat L J 163.

Rama Rao v. Thimmappa.

obviously bad as offending the rule against perpetuities, for the interest would not then vest *in presenti* but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

It is not necessary to notice in detail the other cases such as *Banamali Chowdhury* v. *Ram Kinkar*(3), *Mohin Chandra Pal* v. *Prodyat Kunwar Tagore* (4) and *Chandi Churn Baru* v. *Sidheswari Debi* (5). The agreement in Exs. A and A (1) is one which does not offend against any rule of law. On a proper construction of the document I have no hesitation in holding that the parties did agree that the land leased should be surrendered whenever required by the landlord and that they so contracted is clear from the fact that the landlord agreed to pay half the value of the improvements for trees planted by himself. This evidently is in consideration of the fact that at some future time the lessee may be required to surrender the land to the lessor. I therefore hold that the learned District Judge was wrong in construing that the last clause of the document was repugnant to the rest of the document.

Mr. Sitarama Rao's next contention is that his client should not be asked to pay for the value of the buildings on the land. I do not think the landlord is entitled to re-enter upon the land without paying for the value of the improvements. In the document itself the expression is " full value for plants planted by you out of the value fixed by wise persons for the improvements and surrender the property to us. " I think this clearly shows that the lessor contracted to pay for the improvements on the land whatever be the nature of the improvements. I do not think the lessor is entitled to re-enter without paying compensation for the value of the buildings and other improvements effected by the tenant.

In the result the decree of the District Judge is set aside and that of the District Munsif restored.

Each party will bear his costs in this Court. Appellant will have his costs in the Lower Appellate Court.

A. S. V. *Decree set aside.*

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3. 15 I C 575. 4. (1918) 45 I C 651.
5. (1888) I L R 16 C 71 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Kandalam Krishnamacharyulu and another ... *Appellants** (*Plaintiffs*)

v.

Sathuluri Vijayasarathi, minor, by mother and guardian Rangamma and others ... *Respondents* (*Defendants*).

Krishnamacharyulu *v.* Vijayasarathi.

Evidence Act, S. 32 (5)—Relationship—Statement of deceased person as to existence of—Admissibility—Condition—Person connected with family in question only through marriage of some other—Statements by—Admissibility—Inam Register—Evidentiary value of—Proof of inquiry by Inam Commissioner unnecessary.

Statements relating to the existence of the relationship of a particular person to a particular family made by a deceased person who was not himself a member of the family in question, who was not connected or related through his own marriage to that family but was only connected or related to it through the marriage of some other, and who had no special means of knowledge, are not admissible in evidence under S. 32 (5) of the Evidence Act.

The Inam Register embodies the conclusions of the Inam Commissioner on such enquiry as he chooses to make upon the statements filed before him. The presumption is that he made such an enquiry. And the register cannot be rejected on the ground that there is no proof that the Inam Commissioner made an enquiry.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Ellore in A. S. No. 83 of 1920, preferred against the decree of the Court of the Additional District Munsif of Narasapur in C. S. No. 105 of 1917.

G. Lakshmanna for appellants.

A. Krishnaswami Aiyar, M. Narasimham and *V. Govindarajachari* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs are the appellants before me. The suit was brought by them as reversioners to recover possession of certain properties alienated by the widow of the last male owner. The last male owner was one Vijayasarathi who died in 1867. He died while he was a minor. In the year of his death the two alienations in question were effected on behalf of the widow by her father by Exs. I and II. Two points arose for decision in the case, (1) whether the plaintiffs are the reversioners of Vijayasarathi, and (2) whether the alienations are binding on the reversioners. The

*Second Appeal No. 136 of 1921. 6th November 1924.

Krishnamacharyulu v. Vijayasarathi.

District Munsif decided both the points in favour of the plaintiffs and gave a decree. On appeal the Subordinate Judge found both the issues against the plaintiffs and dismissed the plaintiffs' suit. Hence the plaintiffs have filed this Second Appeal.

In Second Appeal both the findings of the Subordinate Judge are attacked before me. Taking the first point, namely, that of reversionership, the Subordinate Judge found that two of the inam statements relied on by the District Munsif, namely Exs. A and C were irrelevant and were wrongly admitted by the District Munsif. I think the Subordinate Judge is right in this. These inam statements, Exs. A and C, purported to be filed on behalf of Butchamma, were actually signed by Komandur Krishnamachari, her brother's son. It is true that one of these, Ex. C, contains statements purporting to be made by her, but the fact remains that Exs. A and C were signed only by him and there is no other evidence to show that she actually dictated the contents to him or got them written under her directions and so on as in *Shahzadi Begam* v. *Secretary of State for India* (1). Krishnamachari is not a member of the Kandalam family with which we are concerned, nor has he married a member of the Kandalam family. That being so, his statement, unless there is other evidence that he has special means of knowledge, is not relevant. Vide *Sangram Singh* v. *Rajan Bibi* (2), *Jagatpal Singh* v. *Jageshwar Buksh Singh* (3) and Taylor on *Evidence,* S. 636. The case of *Shamlal Singh* v. *Radha Bibee* (4) relied on by Mr. Lakshmanna cannot help him. There it was shown that the person whose statement was sought to be admitted was a family priest. This corresponds to evidence that he had special means of knowledge. In *Suraj Bali* v. *Tilok Chand* (5) the deponent was the son-in-law of the family. That falls within the rule stated above and cannot help in this case where the person was only connected or related through marriage of some other and not by his own marriage to the family in question.

The next complaint made against the Subordinate Judge's judgment on the first point is the manner in which he dealt with Ex. B. Ex. B is an Inam Register. As to this the Sub-

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1. (1907) I L R 34 C 1059. (P. C.). 2. (1885) I L R 12 C 219.
3. (1902) I L R 25 A 143. 4. (1879) 4 C L R 173.
5. (1916) 36 I C 66.

Krishnamacharyulu v. Vijavasarathi.

ordinate Judge says, " There is absolutely nothing to show that there was an enquiry by the Inam Commissioner as to the correctness of the pedigrees produced on behalf of Butchamma and that any decision was arrived at by him." I think the Subordinate Judge is wrong in this statement. As pointed out in *Pir Pacha Sahib* v. *Mohammad Ruhimuddin Sahib* (6), the Inam Register embodied the conclusions of the Inam Commissioner on such enquiry as he chooses to make upon the statements filed before him. The presumption is that Inam Registers in the country embody the findings of the Inam Commissioner after such investigation. There is no rule prescribing the extent of the investigation to be made by the Inam Commissioner. In *Arunachalam Chetty* v. *Venkatachelapathi Guruswamigal* (7) the Privy Council have pointed out that the Inam Register is "a great act of State " and is entitled to very great weight. It may be in particular cases some reasons may be given why the Inam Register might be discounted; but the particular reason given by the Subordinate Judge in this case is no reason at all, for he expects some proof that the Inam Commissioner made some actual enquiry, a proof which is impossible and a proof which cannot be adduced ; whereas, as pointed out in *Pir Pacha Saheb* v. *Mohammad Ruhimuddin Sahib* (6), the presumption is that he made such an enquiry. Secondly, the Subordinate Judge says, " There is absolutely nothing to connect the plaintiffs with Kandalam Raghavacharyulu referred to in the fourth sheet of Ex. B." In this again I think he is wrong and he has not applied his mind to the facts and documents in the case. Raghavacharyulu is another co-sharer according to Ex. B. The evidence on behalf of the plaintiffs shows that the share then enjoyed by Raghavacharyulu and his brother Ananthacharlu are now enjoyed by the two plaintiffs, and unless these witnesses are disbelieved, it is impossible to say that Raghavacharyulu in the Inam Register is not connected with the present plaintiffs.

I am, therefore, constrained not to accept the finding of the Subordinate Judge on the first issue. If the case cannot be disposed of otherwise, I would be compelled to send the case back and call for a finding on this issue. But it seems to me that the Second Appeal must fail on account of the findings on the second point.

6. (1923) 46 M L J 245.
7. (1919) I L R 43 M 253 : 37 M L J 460 (P C).

Krishnama-charyulu v. Vijaya-sarathi.

The second point, as I have already stated, is whether the alienations were for purposes binding on the reversioners. The Subordinate Judge refers to *Venkata Reddi* v. *Rani Sahiba of Wadwan* (8) [*cf.* also *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhri* (9)] and to the evidence of the defendants' witnesses 1 and 5 and then says, "It is proved that the alienations were for discharging antecedent debts binding on the reversioners." It is true there are several peculiar features in this case which are not to be found generally in alienations by widows. In this case the alienations were not actually made by the widow but on her behalf by her father. The first sale was to her brother, that is, her father was selling the property to his own son. The second sale was also to a relation. The Subordinate Judge does not specifically advert to this circumstance. He does not also refer to unsatisfactory features in the evidence of the defendants' 1st and 5th witnesses. The evidence of the 1st witness turns out to be mostly hearsay in cross-examination. These features of his judgment which I have pointed out have produced in me the impression that his judgment is very unsatisfactory, and probably he has conceived a bias against reversioner's suits. But in spite of all the circumstances, I am not able to reject the finding of the Subordinate Judge on the second point. It is legally arrived at and, however much one may feel dissatisfied with it, I do not think I am justified in rejecting it, though I regret my inability to interfere with it.

Accepting, therefore, the finding only on the second point, I dismiss the Second Appeal with one set of costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Krishna Sastri and others ... *Appellants**

v.

Singaravelu Mudaliar and others ... *Respondents.*

Krishna Sastri v. Singaravelu Mudaliar.

Service Inam—Enfranchisement—Effect—Right to question grantee's title—Rigt of members of his family—Right of stranger's claim to enfranchised

*Second Appeals Nos. 287 and 288 of 1921. 19th December, 1924.

8. (1919) I L R 43 M 541 : 38 M L J 393 (P C).

9. (1917) I L R 44 C 186 : 31 M L J 563 (P C).

Krishna Sastri v. Singaravelu Mudaliar.

service inam by outsider—Maintainability—Conditions—Adverse possession against Government—Proof—Quantum—Proof of long possession—Effect.

The grant of a title-deed at enfranchisement of a service inam (unlike the case of a personal inam) does confer a new title on the grantee, and, for this reason, it cannot be questioned by other members of his family. It can no more be questioned by persons unconnected either with the office or with the family of the grantee. It would, however, be open to an outsider claiming an enfranchised service inam to show that either that it was not an inam at all liable to resumption or that he had by prescription acquired a title to the property, good, not only as against the service holder, but also against Government, so that Government's power of disposition was lost. This would, of course, involve adverse possession for 60 years. It is not sufficient to prove possession for a long period, but possession for the whole period of 60 years must be proved. Where there was no such evidence, but only evidence of long possession which the Court held to be for over 60 years on the general probabilities, *held*, that the finding of possession for 60 years could not be accepted.

Second Appeals against the decrees of the Court of the Subordinate Judge of Chingleput in Appeal Suits Nos. 105 and 106 of 1919, respectively, preferred against the decrees of the Court of the District Munsif of Tiruvallur in Original Suits Nos. 267 and 282 of 1918, respectively.

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar* for appellants.

K. Rajah Aiyar for *S. V. Narayana Aiyar* for respondents.

These second appeals came on for hearing on 16th and 21st March, 1923, and the Court (Ayling and Odgers, JJ.) delivered the following

JUDGMENTS :—*Ayling, J.* :—The subject-matter of these appeals is a certain karnam's inam (plaint item E) which was enfranchised in 1911 in the name of Krishna Sastri (1st appellant in each of the appeals before us). The registered karnam at that time was one Munia Pillai, who had six years earlier sold the inam land to Raghava Sastri, son of Krishna Sastri, by Exhibit IV. The enfranchisement in the name of Krishna Sastri was apparently made to save trouble and to give effect to a clause in Exhibit IV providing for patta being granted in the vendee's name. Apparently Raghava Sastri was really a benamidar for his father (who was village munsif). This explains why Krishna Sastri's name appears in the title-deed.

Ayling, J.

The suits were brought by the legal representatives of one Duraiswami Mudaliar for recovery and partition between them of the said land. It was not denied that the land was originally karnam service inam ; but it was alleged that Durai-

Krishna Sastri v. Singaravelu Mudaliar.

Ayling, J.

swami Mudaliar and his family had acquired title by prescription (no other title seems to be set up) and were entitled to recover.

The Lower Courts have found in favour of these contentions and given decrees in plaintiffs-respondents' favour.

The point argued before us by Mr. Govindaraghava Aiyar on behalf of Krishna Sastri and his sons (appellants) is that, in view of the ruling of the Privy Council in *Venkata Jagannadha* v. *Veerabhadrayya* (1) the grant of the title-deed to Krishna Sastri on enfranchisement must be held to constitute a fresh root of title in the latter, good against all the world, and that the suits should therefore be dismissed.

The Lower Appellate Court has found that Krishna Sastri has been in possession since the date of enfranchisement only; and that prior to 1911 possession was with Duraiswami's family for a long time. How long is not stated, but it must be taken to be more than twelve years so as to confer title as against private persons.

Our decision must practically turn on the effect to be given to the judgment of the Privy Council in *Venkata Jagannadha* v. *Veerabhadrayya* (1) and we have had a long argument at the bar as to the meaning which their Lordships intended to convey. I have already referred to the view put forward on appellants' behalf. Mr. Rajah Aiyar, who appears for respondents, has argued that the judgment merely deals with the right of the members of the family of the person in whose name the title-deed is issued to claim an interest in the enfranchised property, that it has no application to claim put forward by outsiders, and that it does not affect the validity of earlier decisions in so far as these relate to claims by outsiders.

I have given the most careful study I can to the terms of the Privy Council judgment and have come to the conclusion that the interpretation sought to be placed on it by appellants' vakil is substantially correct, and not that argued for on behalf of respondents.

Their Lordships make it quite clear that as regards the effect of enfranchisement on title to the property enfranchised, personal inams and service inams stand on a totally different footing. They refer, without disapproval, and as

1. (1921) I L R 44 M 643 ; 41 M L J 1 (P C).

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it seems to me with approval, to the decision in *Narayana* v. *Chengalamma* (2) to the effect that in the case of a palayam (personal inam) the title-deed granted at enfranchisement did not confer any new title and that enfranchisement had no larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service. They then proceed to dissent in the most emphatic terms to the extension of this doctrine to a karnam's service inam ; and to the view expressed by Bhashyam Aiyangar, J., in *Gunnaiyan* v. *Kamakshi Aiyar* (3), that the law laid down as to palayams "is law bearing on the enfranchisement of inams, whether they be personal inams or service inams." Now the view of Bhashyam Aiyangar, J., in that case is summarized in these words at page 344 : "In my opinion the enfranchisement of a service inam does not operate as a resumption, and the fresh grant by Government subject to the payment of a quit-rent, any more than it is so in the case of the enfranchisement of a personal inam."

This view of Bhashyam Aiyangar, J.'s is expressly adopted by the Full Bench in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4), regarding which their Lordships of the Privy Council state in the most explicit terms :

"Their Lordships are of opinion that the Full Bench was in error."

On the other hand the decisions of an earlier Full Bench in *Venkata* v. *Rama* (5) and of a Divisional Bench in *Venkatarayadu* v. *Venkataramayya* (6) are quoted with approval [both being dissented from *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4)].

The former I shall deal with presently ; the latter stated in terms : "The effect of enfranchisement was to free the lands from their inalienable character and *to empower the Government to deal with them as they pleased.*"

This passage is quoted in the Privy Council judgment.

The case in *Venkata* v. *Rama* (5) also related to a karnam service inam. The post of karnam was held by the defendant at the time of enfranchisement, and title-deed was issued in his name. The suit was brought by a person who was not in office at the time of enfranchisement, but who

2. (1886) I L R 10 M 1. 3. (1902) I L R 26 M 339.
4. (1907) I L R 30 M 434 : 17 M L J 101 (F B).
5. (1884) I L R 8 Mad. 249 (F. B.) 6. (1891) I L R 15 M 284.

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Ayling, J.

was a member of a family hereditarily entitled to preference in appointment, and who, if personally qualified, could have secured the post and the emoluments (prior to enfranchisement) by a suit before the Collector (*vide* Hutchins, J., in his referring judgment at page 251). The defendant on the other hand lost the post of karnam after enfranchisement, another man being preferred to him. Nevertheless the Full Bench held that having been in office at the time of enfranchisement, and having had the title-deed issued in his name, his title could not be questioned by plaintiff. Unless the decision was based on the footing of a new title conferred at enfranchisement, it is difficult to see how it could be supported and that, I think, was the effect of the judgment of the majority Judges.

Mr. Rajah Aiyar points to the stress which the learned Judges laid on the fact that the appellant was not in office at the time of enfranchisement, and in particular to the concluding paragraph of the judgment of Turner, C. J.

" On the ground that the respondent was not the holder of the office when the lands were enfranchised, I must hold that he has failed to show a title to the lands and that his claim is unfounded. If he had established a title, if he had shown that at the time of the enfranchisement of the inam he had been appointed to the office, the Court would have had jurisdiction to determine whether the enfranchisement in favour of the appellant could be supported. I would reverse the decrees of the Courts below and dismiss the suits with costs."

It is argued that this is incompatible with the view that the issue of the title-deed conferred a new title. I do not think it is. I think what the learned Judges meant was that if plaintiff had been in office at the time of enfranchisement, it would have been open to the Court to consider whether the enfranchisement in favour of defendant was legal or *ultra vires*. This may be so. It is a point not alluded to in the judgment of the Privy Council, but it is unnecessary to say that the claim before us is not such a contention.

I think the judgment of the Privy Council amounts to stating that the grant of a title-deed at enfranchisement of a service inam (unlike the case of a personal inam) does confer a new title, and that, for this reason, it cannot be questioned by other members of his family. They say in the penultimate paragraph of the judgment " when accordingly, on the 21st

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March, 1906, the title-deed already quoted was granted by way of an inam to the appellant's father and was in express words confirmed" to him, his representatives and assigns, to hold or dispose of as he or they think proper, "The Board is of opinion that that enfranchisement must be given full effect to, and that it is not subject to be eviscerated or altered by the claim for partition or division put forward in the present suit."

I think this carries with it the implication, that it can no more be questioned by persons unconnected either with the office or with the family of the grantee—as are the plaintiffs in these suits (this is subject to one reservation to which I shall presently allude). The grant of a new title which could be questioned by any outsider who had trespassed on the property would be meaningless.

This is as far as one need go for the purpose of the present case. The reservation to which I have referred is this. It would, I conceive, be open to an outsider claiming an enfranchised service inam to show that either that it was not an inam at all liable to resumption or that he had by prescription acquired a title to the property, good, not only as against the service holder, but also against Government, so that Government power of disposition was lost. This would, of course, involve adverse possession for 60 years.

I may add that I have not deemed it necessary to discuss earlier rulings of this Court or the effect of the various Madras Acts [discussed by Bhashyam Aiyangar, J. in *Gunnaiyan* v. *Kamakshi Aiyar* (3)]—all of which must be deemed to have been within the consideration of their Lordships of the Privy Council. As I understand it, our duty is to understand, as well as we can, and give effect to the authoritative exposition of the law contained in their judgment in *Venkata Jagannadha* v. *Veerabhadrayya* (1).

Our attention was drawn to a recent decision of a Bench of this Court not reported in the I. L. R. Series, but to be found in *Lakshminarasimham* v. *Venkataratnayamma* (7). From this in so far as it deals with bearing of the Privy Council decision on the effect of a title I must respectfully dissent. I may incidentally remark that the scope and intent of Madras Act VIII of 1869, referred to therein, may be gathered from the preamble. It would appear to be directed to

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).

3. (1902) I L R 26 M 339. 7. (1921) 38 M L T 334.

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Ayling, J.

protect the interest of kudivaramdars where the inam consisted only of the melvaram.

The learned vakil for respondents claims the opportunity of showing that he has acquired a complete title by 60 years adverse possession. I would therefore call for a finding from the Lower Appellate Court on the following issue :—

Have plaintiffs acquired a title to the suit properties by adverse possession as against Government ?

Fresh evidence may be adduced. Finding will be submitted within four months, and seven days will be allowed for filing objections.

Odgers, J.

Odgers, J. :—The facts are fully set out in the judgment of my learned brother. I deal with the sole question of law raised in this case as to whether the decision of the Privy Council in *Venkata Jagannadha* v. *Veerabhadrayya* (1) is to the effect that enfranchisement of a karnam service inam founds a new root of title in favour of the person in whose name the inam is enfranchised ; or whether it has a restricted application, *i. e.*, it only extends to extinguish the claims of the family of such person, and does not apply to the case of a stranger (as in the appeals before us).

There can be no doubt whatever that the decision in *Venkata Jagannadha* v. *Veerabhadrayya* (1) has affected a change in the law. Referring to the judgment of the Full Bench in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) reversing the law as laid down in *Venkata* v. *Rama* (5), their Lordships say, " This procedure has been of course full of perplexity and that perplexity must now, if possible, be brought to an end. " Again their Lordships are of opinion that the Full Bench ruling in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4), approving and adopting the decision in *Gunnaiyan* v. *Kamakshi Aiyar* (3) was erroneous, that the case of a karnam inam stands on its own footing and that the principles applicable thereto were properly decided in *Venkata* v. *Rama* (5) by the Full Court.

The law as stated in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) was that the effect of enfranchisement was not to confer on the persons named in the title-deed any right in derogation of those possessed by other persons

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).
3. (1902) I L R 26 M 339.
4. (1907) I L R 30 M 434 : 17 M L J 101 (F B).
5. (1884) I L R 8 M 249 (F B).

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in the inam at the time of the enfranchisement. This was a case of a Hindu widow who (as the Full Bench says) could not have been in any view constituted absolute owner by the grant. That the decision in *Venkata* v. *Rama* (5) is capable of the construction sought to be attached to it by the appellants here is obvious from the remarks of the Full Bench in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) : "There are undoubtedly observations in the judgments of the learned Chief Justice and of Brandt, J. which go strongly to support the view that enfranchisement involved a resumption of the inam by Government and a fresh grant in favour of the persons named in the title-deed." The decision however finally adopted as correctly stating the law is *Gunnaiyan* v. *Kamakshi Aiyar* (3). In that case it was held that the enfranchisement of a service inam does not operate as a resumption and fresh grant by Government subject to the payment of a quit rent, any more than in the case of a personal inam. The enfranchisement of a village service inam stands on the same footing (*i. e.*, as a personal inam) as far as the family in which the village office is hereditary is concerned.

The Privy Council differs from this view and state that the law as to service and private inams is different and that the error in the law here has crept in owing to these distinctions having been confused as it appeared from *Narayana* v. *Chengalamma* (2). Their Lordships say (page 654) :—"It is accordingly not to be wondered at that when a case of this nature was brought before the Courts, as in *Narayana* v. *Chengalamma* (2), already referred to, it should have been held that the inam title-deed which had been granted to the palayagar in that case did not confer any new title and that the enfranchisement had no 'larger operation than as release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service.' The decision forms no authority for the same principle being extended to the case of a karnam." This seems clearly to imply that in the case of a karnam enfranchisement the title-deed would have conferred a new title.

While thus disapproving the decisions in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) and *Gunnaiyan* v. *Kamakshi Aiyar* (3), the Privy Council approve

2. (1886) I L R 10 M 1. 3. (1902) I L R 26 M 339.
4. (1907) I L R 30 M 434 at 436 : 17 M L J 101 (F B).
5. (1884) I L R 8 M 249 (F B).

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that in *Venkata* v. *Rama* (5). "In the opinion of the Board the Law of Madras was thus soundly stated (by Collins, C. J. and Muttuswami Aiyar, J.) and that judgment should not have been disturbed." The facts of *Venkata* v. *Rama* (5) are set out in the referring judgment of Hutchins, J. Plaintiff's adoptive father held the karnam office, he died in 1870 when plaintiff was a minor. The defendant-appellant was appointed karnam in 1877 and a year or two later the lands were enfranchised in his name as the person at the time in possession. He had no hereditary claim and was therefore a stranger to the family in which the office ordinarily ran. The plaintiff brought a suit to recover the lands which plaintiff alleged belonged to his ancestors as karnam's inam. The plaintiff's claim was decreed by the Munsif and confirmed by the District Judge. On the appeal to this Court by the defendant the decrees below were reversed.

Turner, C. J., after discussing the regulations as to the mode of selection, disqualification, etc., of holders of such offices says :—" It may be that in some instances the land is not the emolument of the office, but a reduction of the assessment. In such a case the Government could not resume the land, but only deal with the assessment. But in the case before us the orders of the revenue authorities show that the lands are and were attached to the office and though the respondent's father may have improperly obtained possession of them, the Government was at liberty to resume them and to confer them on the office-holder, and it did so confer them on the appellant through the Collector in 1877." The learned Chief Justice holds that respondent had failed to show title as he was not the holder of the office when the lands were enfranchised. If he could have shown that at the time of enfranchisement he had been appointed to the office, the Court could have determined whether the enfranchisement in favour of the appellant could be supported. These observations are not referred to by the Privy Council and in my opinion afford no ground for the suggestion that the only effect of enfranchisement is to bar the claims of the family.

From Muttuswami Aiyar, J.'s judgment it is clear that the contention for the appellant was (page 265) that the title-deed gave him a valid title to the land. The following passage of Muttuswami Aiyar, J.'s judgment was quoted with

5. (1884) I L R 8 M 249 (F B).

approval by the Privy Council (page 267) : "According to the law, therefore, as it stood prior to the enfranchisement of the inam, a right to the land could only be legally acquired through the right to the possession of the office, and neither the respondent's father nor the respondent had then any vested interest in the office to sustain an action in the nature of an ejectment."

Also in the judgment of Brandt, J., the following passage may be quoted : "I think it may be taken that such lands were enfranchised in favour, not of the family generally, but of the office-holder for the time being, in which case they would presumably descend not to all the members of the family, but to the branch or heirs of the person in whose favour it was enfranchised."

The decision in *Venkatarayudu* v. *Venkataramayya* (6) was quoted and approved by the Privy Council.

"The effect," said Collins, C. J., in that case, "of enfranchisement was to free the lands from their inalienable character and empower the Government to deal with them as they pleased."

In *Dharanipragada Durgamma* v. *Kadambari Virrazu* (8), the Court said of the Full Bench in *Venkata* v. *Rama* (5) (page 48), "that decision proceeded on the broad ground that the plaintiff did not hold the office of karnam at the time of the enfranchisement and, therefore, had no title to sue for the lands and that the land when enfranchised was at the disposal of Government and alienable to whomsoever the Government pleased. It regarded the inam title-deed as evidence of the grant of the land personally to the grantee, and that was the view followed in the case on which the Subordinate Judge relies *Venktarayudu* v. *Venkataramayya* (6).

So also *Subbaraya Mudali* v. *Kamu Chetty* (9) the right of a widow of a deceased manyam service holder was held after enfranchisement (after his death) to confer a right not limited to that of a widow's estate.

This decision is also quoted with approval by the Privy Council, their Lordships saying that it was expressly decided as following the Full Bench decision in *Venkata* v. *Rama* (5).

As against this line of decisions, Mr. Rajah Aiyar contends that on the Madras Acts, IV of 1862, IV of 1866 and

5. (1884) I L R 249 (F B). 6. (1891) I L R 15 M 284.
8. (1897) I L R 21 M 47. 9. (1899) I L R 23 M 47 : 9 M L J 160.

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VIII of 1869 the only effect of enfranchisement is to remove the service obligation. Act IV of 1866, preamble, states that certain inams have been enfranchised from the condition of service and placed in same position as other descriptions of landed property in regard to their future succession and transmission and by S. 2 the title-deed is to be sufficient proof of enfranchisement.

Act IV of 1862 is to the same effect.

Act VIII of 1869 lays down that nothing in the inam deed is to destroy the rights of any description of holders or occupiers of land from which any inam is derived or drawn or affect the interests of any person other than the inam holder. By the preamble the doubt removed is limited to cases where the inam holders do not possess the proprietary right in the soil but only the right of receiving the rent or tax payable to Government, etc. This seems to me to point to the well-known distinction vested on the owners of the melwaram and kudivaram. None of the Acts appear to me to help the respondent in his contention.

There is, however, a case of this Court reported in *Lakshminarasimham* v. *Venkataratnayamma* (7), wherein it was held by Spencer, J. on the authority of Act VIII of 1869 that no independent title is created by a grant of title-deeds and that no title arises from the title-deed that was not already inherent in plaintiff or her husband. Ramesam, J., held that *Venkata Jagannadha* v. *Veerabhadrayya* (1) did not apply to a case of conflict between the title of an office-holder and that of a person other than an office-holder claiming on ground that he was named in the title-deed, as the title-deed in that case was issued to the office-holder.

It appears to me from the result of my examination of *Venkata Jagannadha* v. *Veerabhadrayya* (1) and *Venkata* v. *Rama* (5) that the Privy Council judgment went further than that. There are the clear words of Collins, C. J. in *Venkatarayudu* v. *Venkataramayya* (6) as approved by the Privy Council and also in my opinion the inferences to be drawn from the Privy Council judgment itself indicated above to the effect that enfranchisement does confer a title like any other deed of conveyance on the person to whom it is granted, and it is not necessarily con-

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).
5. (1884) I L R 8 M 249 (F B). 6. (1891) I L R 15 M 284.
7. (1921) 30 M L T 334.

fined to grants to persons either holding the office at the time of enfranchisement or those claiming the right to do so; though ordinarily no doubt as the land follows the office, the title would be conferred on the office-holder at the time of enfranchisement; with respect therefore I am unable to concur in the narrow construction placed on the Privy Council judgment in *Lakshminarasimham* v. *Venkataratnayamma* (7). I think their Lordships of the Privy Council meant to lay down a broad general principle and as will be seen from the extracts quoted, their language was by no means limited to the facts of the actual case before them.

I may also add that in my view the decision in *Lakshminarasimham* v. *Venkataratnayamma* (7) as to the effect of Madras Act VIII of 1869 is for the reasons stated by me erroneous.

I therefore think that the point contended by Mr. Govindaraghava Aiyar for appellants must succeed.

I agree with the order proposed by my learned brother.

In compliance with the order contained in the above judgment the Subordinate Judge of Chingleput submitted the following

FINDING:—Thus on a consideration of the material evidence and the general probabilities, I am of opinion that the plaintiffs and their ancestors had been in possession and enjoyment of the lands for over sixty years prior to 1911 and that such possession not being shown to be permissive was adverse to the Government and the office-holder. I accordingly find on the issue remitted that plaintiffs acquired a title to the plaint properties by adverse possession as against the Government.

After the return of the above finding the Court delivered the following

JUDGMENT.—The Subordinate Judge has found that plaintiffs were in possession of the suit lands for more than 60 years before 1911, but objection is taken by appellants that there is no evidence to support this finding. The Subordinate Judge relies on oral statements of witnesses that

7. (1921) 30 M L T 334.

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plaintiffs' family were in possession for a very long period, but except for the statement of plaintiffs' witness No. 1, that his family was in possession for 150 years, a fact which is certainly not within his personal knowledge, there is no evidence which fixes the date of possession as early as 1851, and this is essential in order to prove adverse possession, for 60 years. It is not sufficient to prove possession for a long period but, as pointed out by the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao* (10), possession for the whole period of 60 years must be affirmatively proved. In the present case there is no such evidence, but only evidence of long possession which the Subordinate Judge has held to be for ever 60 years on the general probabilities. This he is not justified in doing and we cannot therefore accept his finding. The burden of proof was on plaintiffs and they have failed to discharge it.

The appeals must therefore be allowed and the suits dismissed with costs throughout, including the costs of the guardian of the 6th respondent in both second appeals.

These second appeals again came on for orders on 19th December, 1924, on account of the 5th respondent not being served with notice, the Court delivered the following

JUDGMENT :—The 5th respondent is given up. The second appeals are dismissed as against her.

A. S. V. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Kedarnath Goenka ... *Appellant**

v.

Anant Prasad Singh and others ... *Respondents.*

P. C.

Kedarnath Goenka v. Anant Prasad Singh.

Civil Procedure Code, 1882, *Ss.* 211, 212 *and* 244—*Decree thereunder for ascertainment of profits—Application under Civil Procedure Code,* 1908, *for such ascertainment—Proceedings in execution or in suit—O.* 22, *R.* 12 *of the Civil Procedure Code,* 1908—*Abatement by death of parties.*

An application for the ascertainment of mesne profits in pursuance of a decree made under the Civil Procedure Code, 1882, is a proceeding in execution of that decree, and not a proceeding in a suit, and hence, under the Civil Pro-

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*P C Appeal No. 101 of 1923. 9th February, 1925.

10. (1916) I L R 39 M 617 : 31 M L J 324 (P C).

cedure Code, 1908, O. 22, R. 12, upon the death of the parties to the suit in which that decree was made, no substitution of new parties is necessary to prevent a possible abatement of the suit.

P. C

Kedarnath Goenka *v.* Anant Prasad Singh.

Appeal from a decree of the High Court (10th March, 1921) rejecting an application for revision of an order of the Subordinate Judge of Monghyr (9th April, 1920).

An order of the Privy Council upon appeal in Suit No. 6 of 1902 (No. 224 of 1901), dated the 7th March, 1913, directed the ascertainment "at the execution stage" of mesne profits on certain property from the 28th November, 1905, till the 29th May, 1914, the plaintiffs in the suit being each awarded a specified share in those profits when ascertained. Bhup Narain Singh, one of the plaintiffs in the suit, died on the 21st January, 1918, and Baijnath Singh, another of the decree-holders, died on the 18th February, 1918. On the 24th January, 1920, the appellant applied for an order declaring that the suit had abated as regards those plaintiffs, no application having yet been made to substitute their representatives on the record, or to set aside the abatement within the six months limited by the Civil Procedure Code in that behalf. On the 14th February, 1920, the sons of Bhup Narain Singh (*i. e.*, Tarini Singh and respondents 4 and 5) applied *ex parte* to be substituted on the record for their deceased father, and an order was made accordingly. Thereafter Tarini Singh died, and respondents 1 to 3, his legal representatives, were brought on the record in his place. On the 13th March, 1920, the appellant made the present application that the order for substitution might be cancelled, and that it be declared that the suit had abated both as regards Bhup Narain Singh and Baijnath Singh. Both the Subordinate Judge (K. Prosad, Esq.) on 9th April, 1920, and the High Court (Das and Ross, JJ.) upon an application for revision of his judgment on the 10th March, 1921, held that an enquiry as to mesne profits being a proceeding in execution of a decree within the meaning of O. 22, R. 12 of the Civil Procedure Code, 1908, R. 3 of that order, providing for abatement, did not apply thereto. The appellant appealed to His Majesty in Council.

A. M. Dunne, K. C. and *E. B. Raikes* for appellant.

The respondents were not represented.

9th February, 1925. The Judgment of the Board was delivered by

P. C.
Kedarnath Goenka v. Anant Prasad Singh.
Lord Shaw.

LORD SHAW :—The question raised on this appeal is one of procedure. The judgments of the Courts below are concurrent ; they are gathered together in the final paragraph of the judgment of the High Court, in which Mr. Justice Das says :—

"I hold that, under the Code of 1882, a proceeding for the ascertainment of mesne profits was a proceeding in execution and that, as the decree, in the present case, was passed under the Code of 1882, such proceedings must be held in execution and not in suit. That being so, O. 22, R. 12, applies, and it must follow that substitution was not necessary."

Their Lordships have heard a persistent argument criticising the entire authorities cited in the case ; they have considered that argument and the authorities ; and they now declare that nothing has been urged which would induce them upon this point of procedure to express disagreement with the result arrived at in the Courts below.

In their Lordships' opinion, the appeal accordingly ought to be dismissed, and advice will be humbly tendered to His Majesty in that sense.

Solicitors for appellant : *Watkins and Hunter.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Motilal Itchhalal Gandhi ... *Appellant**

v.

Haji Moosa Haji Mahomed ... *Respondent.*

P C.
Motilal Itchhalal Gandhi v. Haji Moosa Haji Mahomed.

Contract for sale of land—Time of essence of contract—Prolonged negotiations for completion of sale—Purchaser's delay—Vendor's notice to complete within five days—Reasonableness of notice.

In a contract dated the 27th February, 1919 for the sale of land, it was stipulated that completion was to be within two (subsequently extended to three) months, and that time was of the essence of the contract. Subsequently, owing to the purchaser's further delay, the vendor gave him notice determining the contract on the 13th May, but, on discovering his mistake, allowed the contract to continue beyond the three months. *Held* that the conditions to time being of the essence of the contract was, by the conduct of the parties, abandoned.

After certain correspondence between the solicitors for the parties, in August 1919 (by which time the requisitions on title had long since been answered, and the draft conveyance approved, and the balance of the purchase-

*P C Appeal No. 99 of 1923. 23rd January, 1925.

price remained to be paid), the vendor gave the purchaser notice that he must complete within five days failing which the contract would be treated as cancelled. The purchaser failed to comply with the notice, and later when he had found a sub-purchaser, sued the vendor for specific performance, alleging that the notice was too short, and therefore unreasonable. *Held* that in the circumstances, the notice was reasonable, especially as the purchaser had himself, in the course of the correspondence, asserted that the engrossment of the conveyance and the purchase-money were ready.

The appellant on the 27th February, 1919, agreed in writing to sell to the respondent certain land and property at No. 27-29, Ardeshir Dady Street, Bombay, for Rs. 35,000, of which Rs. 500 was paid as a deposit on the signing of the agreement, and completion was to take place within two months subsequently extended to three months time being stipulated to be of the essence of the contract. On the 13th March, 1919, the respondent asked for and on the 19th March obtained the title-deeds, but as nothing further was done, the appellant gave notice determining the contract on the 13th May. On discovering his mistake, the appellant allowed the contract to continue beyond the three months' period. On the 29th July, the appellant, having finally answered all requisitions on title and approved the draft conveyance asked for an early appointment to complete. The respondent's attorneys thereupon again asked for the title-deeds for considering the answers to the requisitions and for the current Municipal bill, and these were duly sent to them on the 2nd and 6th August respectively. Owing to the further delay in completion, subsequent correspondence took place between the attorneys of the parties, which is set forth in their Lordships' judgment. The appellant then put an end to the contract, and thereupon the respondent arranged with his sub-purchaser, in consideration of an abatement of Rs. 1600 in the price, to obtain Rs. 34,500 of the purchase-money for payment to the appellant, which being tendered, the appellant then refused. On the 14th October, 1919, the respondent instituted an action in the High Court against the appellant for specific performance of the contract of the 27th February, 1919. Fawcett, J. dismissed the action with costs, but on appeal (Macleod, C. J. and Shah, J.) this judgment was reversed. The appellant thereupon appealed to His Majesty in Council.

Sir George Lowndes, K. C. and *E. B. Raikes* for appellant.

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The respondent was not represented.

23rd January, 1925. The Judgment of the Boad was delivered by

LORD SHAW:—The Board is at a considerable disadvantage in this case on account of the absence of the respondent. The case, however, has been explained with complete candour and fullness by Sir George Lowndes, on behalf of the appellant.

In the contract for the sale of this immoveable property, made in the month of February, 1919, there was a clause making the settlement and the payment of the price subject to the condition that time was of the essence of the contract. The negotiations, however, proceeded, and the parties entered into communication with regard to the furnishing of a title, requisitions were made and answered, and arrangements with the Municiaplity, usual in Bombay, had to be come to so that the battaki announcements should be made in the district.

It is quite clear to their Lordships that the time allowed for completion was far exceeded and the condition as to time being of the essence of this contract was, by the conduct of the parties, obliterated therefrom.

The circumstances which are argued to be alone relevant to the issue are said to begin late in the month of August, 1919. But their Lordships desire it to be understood that they make no pronouncement with regard to whether a notice as to completion would be reasonable or abrupt in the case of a contract made at that period. The contract had been made months before. What had happened was that before the period in August, 1919, alluded to, a clean title had been furnished, a draft conveyance had been prepared, it had been approved by the vendor and had been sent to the agents for the purchaser; and that nothing *de facto* remained to be done of this transaction—every kind of complication being removed—except the mere clerical item of engrossing the draft, and the financial result, namely, the payment of the price. Those two matters alone remained: the price to be paid and the draft conveyance engrossed for signature.

In those circumstances, on the 23rd August, 1919, the vendor's agents wrote saying that the matter must be completed without delay. They intimated by their letter of that date that nearly six months had elapsed since the agree-

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ment was executed, and the sale must accordingly now be completed. The letter may be fully quoted. It is as follows, *viz.* :—

"Bombay, 23rd August, 1919.

"Messrs. Rustamji and Ginwala.

"*Re* Sale of Property at Ardeshir Dady Street.

'Dear Sirs,

"We extremely regret to note that we have not yet received the engrossment of the Conveyance for our comparison. Requisitions on title were answered long ago. Your client had inspection of Trust Deed, and they have been satisfied on all the points. Our client has waited sufficiently long for completion.

"Our client says that your clients have no money and that they have purchased the property from our client only with a view to profiteering. They are out for some purchaser but they have not been able to secure any. It is nearly six months that the agreement was executed and the sale must now be completed without any delay. You should not lose sight of the fact that the agreement provides that the time for completion is the essence of the contract.

"We are therefore instructed to request you to send us the engrossment for comparison. The draft conveyance has already been sent to you duly approved. We are expecting the engrossment within four days from the receipt hereof by you.

"Yours truly,

"(Sd.) MOTICHAND AND DEVIDAS."

This letter of the 23rd August was not unnatural in the circumstances which their Lordships have stated, namely, that everything except the clerical part of engrossing the draft and the financial part of payment had been already finished.

In answer to the letter of the 23rd August this letter, dated 25th August, 1919, was, however, received by the defendant's agents from the agents for the plaintiff, the purchaser. They say :—

"Bombay, 25th August, 1919.

"Messrs. Motichand and Devidas.

"*Re* Sale of Property at Dady Street.

"Dear Sirs,

"With reference to your letter dated the 23rd instant we beg to state that the delay was on your client's part in not replying to the requisitions in time and not furnishing the Municipal bill for a very long time.

"We received the Battaki only recently and have since then taken the engrossment in hand which we shall let you have as soon as it is ready. Your client's suggestion that our client has no money or that he is trying to secure a

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purchaser is an imaginary one. Our client's moneys are lying idle with him since two months past and he is more eager to complete this matter than your client.

"Yours truly,

"(Sd.) RUSTAMJI AND GINWALA."

This letter accordingly cleared away any doubt or hesitation on the part of the vendor and his advisers as to the reasonableness of making an immediate demand for the completion of the sale and the payment of the price. They thereupon wrote the letter of the 27th August giving the five days' notice, which was received on the 28th August, so that four days remained during which these two simple things had to be done, namely, engross the deed and pay the money.

The question before their Lordships is not any serious or complicated question as to what would be a demand of equity in the completion of a transaction of sale recently made, with reference to which many practical things had to be done by way of clearing the title, and reasonable time for needful business arrangements had to be taken into account. In the circumstances of this case it is simply the ordinary commonplace question: Was it reasonable, with the assurance given by a purchaser that he had the money in the bank and the title in his hand, to say, "Well, the contract having been made months ago, do this little matter within four days or the contract is off"?

The Board, having considered the matter, is of opinion that there was no abruptness whatsoever in the conduct of the defendant's agents or in their letter of the 27th August, 1919, and, there being no abruptness in it, the unreasonableness falls to the ground, because the unreasonableness of the demand consists, not in its method, but would have consisted in this, that it would have put the purchaser, whose finances might have been allowed to drop owing to the dragging on of the negotiations, into a position of much embarrassment on such a short notice being given.

Their Lordships are further of opinion that it is not open to this purchaser to set up such a case because the purchaser had given, prior to that notice, the very assurance that no abruptness could be felt by the two statements that he had made, namely, that his money was ready and his title was engrossed. In these circumstances the case for the purchaser falls to the ground. It is explained to the Board that the letter of the 25th August had misstated the facts and

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that it was not in accordance with truth that (*inter alia*) he was ready with the purchase money. It is clear that he is estopped from maintaining that the facts are otherwise than his letter of the 25th August, 1919, represented them to be.

But their Lordships are further of opinion that, whether he was estopped or not, the circumstances of a long-drawn-out transaction in which all remaining to be done was the engrossment of the deed of sale and the payment of the price, demonstrate that as between purchaser and vendor of immoveable property in a time of financial strain it was not a reasonable position for a purchaser to occupy to be unable to complete within four days.

For these reasons their Lordships have to take the course which will presently be announced, but before doing so they have to note that prior to these proceedings the vendor, who was in possession of a certain deposit of Rs. 500, had made offer to refund that if the transaction went off. Through his counsel, an intimation has been made to the Board that he does not resile from that position. Their Lordships do not think it necessary to put this into the decree, but it will be recorded in their judgment and the vendor will act accordingly.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the decree of the Trial Judge should be restored, with costs in both Courts. The respondent will pay the costs of the appeal.

Solicitors for appellant : *T. L. Wilson and Co.*

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Sri Rajah Bommadevara Satyanarayana Vara Prasada Rao Bahadur Zamindar Garu ... *Petitioner* (Defendant—Counter-petitioner)*

v.

Sankarahanapalli Venkata Tirumala Manavallaswamy ... *Respondent (Plaintiff—Petitioner).*

Satyanarayana Vara Prasada Rao Bahadur *v.* Venkata Tirumala Manavallaswamy.

Civil Procedure Code, O. 6, R. 17—Amendment—Powers of—Order of Court allowing amendment—Interference with, in revision.

*C R P No. 195 of 1924. 21st November, 1924.

Satyanarayana Vara Prasada Rao Bahadur v. Venkata Tirumala Manavallaswamy.

O. 6, R. 17, Civil Procedure Code, gives wide powers of amendment and they should always be liberally exercised.

Where the amendment allowed by the Court below did not change the nature of the suit at all and was quite unobjectionable, *held*, that it fell within the scope of R. 17.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Cocanada in C. M. P. No. 1326 of 1923 in O. S. No. 6 of 1923.

V. Suryanarayana for petitioner.

C. Rama Rao for respondent.

The Court delivered the following

JUDGMENT :—It is argued that the Lower Court acted without jurisdiction in allowing the amendment allowed by it. I think the amendment is quite unobjectionable and falls clearly within the scope of R. 17, O. 6 of the Civil Procedure Code. The observations in the case cited in *Ma Shwe Mya* v. *Maung Mo Hnaung* (1) have to be read with the facts of that case. The amendment allowed here does not change the nature of the suit at all. The words of R. 17 give wide powers of amendment and we have the authority of the Privy Council itself in *Ma Shwe Mya* v. *Maung Mo Hnaung* (1) cited for holding "that full powers of amendment must be enjoyed and should always be liberally exercised." The petition fails and is dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Palani Goundan and another ... *Petitioners** (*Accused* 1 *and* 2).

Palani Goundan, *In re.*

Criminal Procedure Code, S. 403, cl. (4)—Second prosecution for offence constituted by same acts—Permissibility—Court trying first offence not competent to try offence subsequently charged—Effect.

S. 403, cl. (4), Criminal Procedure Code, allows a second prosecution for an offence constituted by the same acts if the Court by which the accused was first tried and acquitted was not competent to try the offence subsequently charged. To such a case S. 403 is inapplicable.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India

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*Cr R C No. 405 of 1924

(Cr R P No. 339 of 1924). 20th November, 1924.

1. (1921) I L R 48 Cal. 832 at 835 (P C).

Palani Goundan, *In re.*

Act praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Dharapuram, dated the 23rd May, 1924, in C. C. No. 68 of 1924 and to issue an order directing stay of all further proceedings in the said C. C. No. 68 of 1924 pending disposal of Cr. R. C. No. 405 of 1924 preferred therefrom to the High Court.

V. L. Ethiraj, counsel for petitioners.

The Public Prosecutor on behalf of the Crown, instructed by *K. S. Venkatrama Aiyar* for complainant.

The Court made the following

ORDER :—S. 403, Criminal Procedure Code, cannot be applied here as cl. (4) of that section allows a second prosecution for an offence constituted by the same acts if the Court by which he was first tried was not competent to try the offence subsequently charged. In this case, the accused were acquitted on the former occasion by a Third Class Magistrate who has no jurisdiction to try the charges now made. The point was considered in the case reported in *In re, Venkatranga Josiar* (1) and following that ruling, I hold the Lower Court's order is right and dismiss this petition.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

M. Chidambaram Chettiar ... *Petitioner* (Petitioner)*

v.

S. K. Kother Mytheen Rowther and others ... *Respondents (Respondents).*

Chidambaram Chettiar *v.* Kother Mytheen Rowther.

Civil Procedure Code, O. 33, R. 5—Insolvency of petitioner—If a ground to reject application for leave to sue as a pauper—Procedure in such cases.

A Court cannot dismiss a pauper application on the sole ground that some time subsequent to the application but before orders were passed on the same the petitioner became an insolvent. Insolvency is not one of the grounds mentioned in O. 33, R. 5 on which such an application can be rejected. The proper procedure in such a case would be to enquire into the application, and if leave to sue is granted O. 22, R. 8 can then be applied.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Tinnevelly in O. P. No. 3 of 1922.

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*C R P No. 422 of 1923. 1st December, 1924.

1. (1917) 40 I C 291.

Chidambaram Chettiar v. Kother Mytheen Rowther.

P. V. Krishnaswami Aiyar for petitioner.

K. Rajah Aiyar and *R. Ganapathi Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The order dismissing the pauper application on the sole ground that some time subsequent to the application and before the Court passed its orders the petitioner became an insolvent, cannot be supported. The grounds on which a pauper application can be rejected are stated in O. 33, R. 5, Civil Procedure Code. Subsequent insolvency is not one of the grounds. It is suggested that on his becoming an insolvent the petitioner ceased to have a cause of action under cl. (*d*) ; but cl. (*d*) only provides that his allegations should show a cause of action. That refers to his allegations in his plaint and not to subsequent events. The proper procedure would have been to enquire whether the petitioner was a pauper and if he was and his allegations showed a cause of action to give him leave when his application would be numbered as a suit. If he has become insolvent the provisions of O. 22, R. 8 can then be applied. It is clear that the Official Receiver cannot make himself a party to the pauper application but only to the suit after it is allowed.

The petition is therefore allowed and the Lower Court's order is set aside and the case remanded to that Court for a fresh disposal according to law. Costs to abide and follow the result.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Kanthimathi Ammal ... *Petitioner* (L. R. of the 1st respondent in Appeal No. 361 of 1923 on the file of the High Court)*

v.

R. Perumal Kona and others ... *Respondents (Appellants in do.).*

Kanthimathi Ammal v. Perumal Kona.

Civil Procedure Code, O. 22, R. 4—Death of respondent—Application to bring on record legal representatives in the Memorandum of Objections—Order on—Effect.

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*C. M. P. No. 3969 of 1924. 1st December, 1924.

Kanthimathi Ammal *v.* Perumal Kona.

An order bringing on record the legal representative of the deceased respondent passed with reference to a Memorandum of Objections will enure for the whole appeal and hence the substitution can be directed to be made in the main appeal also. *Vathiar Venkatachari* v. *Ponnappa Aiyangar,* 45 I C 959 followed.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to bring on record the petitioner herein as the legal representative of the deceased 1st respondent Ramaswamia Pillai, so far as the Memorandum of Objections is concerned in Appeal No. 361 of 1923 on the file of the High Court (O. S. No. 40 of 1918 on the file of the Court of the Subordinate Judge of Tuticorin).

Messrs. Chidambaram and *Marthandam* for petitioner.

S. T. Srinivasagopalachari, counsel for respondents.

The Court made the following

ORDER :—This is an application on behalf of the legal representative of the deceased 1st respondent to be brought on record in the place of the 1st respondent in the Memorandum of Cross-Objections. The learned vakil for the petitioner states that he has had no instructions to apply for bringing his clients on record as the legal representative of the deceased 1st respondent. Messrs. Chidambaram and Marthandam, vakils for the appellant, state that having regard to the principle decided in the case of *Vathiar Venkatachari* v. *Ponnappa Aiyangar and others* (1) any order that is made bringing the legal representatives of the deceaesd respondent in the record in the Memorandum of Objections will enure for the whole of the proceedings including the appeal. I see therefore no objection whatever on the present application to make an order directing that the legal representatives of the deceased 1st respondent be brought on the record not only in the Memorandum of Objections, but also in the main appeal. Costs of this application will be costs in the appeal. The learned vakil for the petitioner states that he has filed a vakalat in the Court, but at the instance of the office the vakalat was specially restricted to the Memorandum of Objections. The vakalat which was filed will be for the whole of the proceedings including the appeal and it will be so treated.

T. S. V. *Appeal allowed.*

1. (1918) 45 I C 959.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Theetharappa Pillai ... *Petitioner** (*Counter-petitioner*)

v.

Meenakshi Ammal ... *Respondent* (*Petitioner*).

Theetharappa Pillai v. Meenakshi Ammal.

Criminal Procedure Code, S. 488 (3) as amended—Application for execution of maintenance order—Objections to execution—Duty of Court—"Sufficient cause"—What is—Judicial discretion.

When an application is put in to execute a maintenance order and the counter-petitioner sets out certain grounds on which he contended that the order should not be executed, the Court is bound to consider the sufficiency of the cause alleged and refuse execution if it is satisfied that the cause is sufficient. The use of the expression "sufficient cause" in the sub-clause as amended indicates that the Magistrate is to use his judicial discretion having regard to all the circumstances.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Tuticorin in M. C. No. 3 of 1924.

K. P. Ramakrishna Aiyar for petitioner.

S. Ramaswami Aiyar for respondent.

The Court made the following

ORDER :—The order of the Sub-divisional Magistrate of Tuticorin, dated 23rd March, 1924, directing the execution of the order for maintenance was clearly wrong and should be set aside. The counter-petitioner before the Magistrate, who is the petitioner before me, filed a counter-petition presumably under sub-clause (3) to S. 488 of the Criminal Procedure Code setting out certain grounds on which he contended that the order should not be executed. The words in sub-clause (3) of the section as now amended are, "If any person so ordered fails *without sufficient cause* to comply with the order, etc." These words clearly contemplate a counter-petitioner in such circumstances coming into Court when execution of the order is applied for and showing cause why it should not be executed. The Court is then bound to consider the sufficiency of the cause alleged by the counter-petitioner and to refuse the execution if the Court should be satisfied that the cause is sufficient and to grant execution if the Court is not satisfied with the cause alleged. It is contended by the

*Cr R C No. 330 of 1924
(Cr.R P No. 275 of 1924). 10th December, 1924.

Theetharappa Pillai v. Meenakshi Ammal.

learned vakil for the respondent that having regard to the terms of sub-clause (5) to S. 488 of the Code of Criminal Procedure, it is not open to any counter-petitioner who has not had the order against him set aside under that sub-clause to come under sub-clause (3) and seek to show any sufficient cause against the execution of the order. But it seems to me that such a construction would involve the Court not giving effect to the clear words contained in sub-clause (3), namely, "failing without sufficient cause". I am therefore clearly of opinion that the Sub-divisional Magistrate erred in summarily ordering execution without considering the grounds set out in the counter-petition. I do not want to prejudice either party by any expression of opinion with regard to what would or would not constitute sufficient grounds within the meaning of sub-clause (3) of the section. The Legislature has deliberately used the expression "sufficient cause" obviously intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances and that such judicial discretion should not be fettered or limited by any definite rules. The learned vakil for the respondent submitted that if after an order under the section had been made and when execution of the order is sought by the petitioner, the counter-petitioner would not be entitled to come to the Magistrate and say that he was then willing to take back the petitioner and maintain her and contend that that would be sufficient cause within the meaning of sub-clause (3). But as I have already observed whether in the circumstances of the particular case such a contention would or would not be sufficient cause must be determined judicially by the Magistrate himself. If, for instance, the original order had been made on the ground of the refusal of the counter-petitioner to maintain the petitioner, then the offer of the counter-petitioner to maintain the petitioner may be sufficient cause; but if the original order for maintenance had been made in spite of the offer of the counter-petitioner to maintain her then obviously the mere offer of the counter-petitioner to maintain her would not in the circumstances be a sufficient cause. I have referred to these matters only by way of illustration. The expression "sufficient cause" is wide enough to include all possible considerations that may be submitted to the Magistrate in such circumstances.

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I therefore set aside the order of the Sub-divisional Magistrate directing the execution of the order and I direct that the application for execution and the counter-petition be taken on the file and he heard and disposed of by the Magistrate in the light of the observations I have made.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Akki Guru Basappa and another ... *Appellants* (Appellants in S. A. No.* 535 *of* 1921 *on the file of the High Court)*

v.

Vuluvathi Setra Santhappa and others ... *Plaintiff and defendants Nos.* 1 *and* 5 *(Respondents).*

Guru Basappa v. Santhappa.

Transfer of Property Act, S. 52—Lis pendens—*Doctrine of—Sale deed executed before but registered after institution of suit.*

A sale deed executed before but registered after the filing of a suit is not affected by the doctrine of *lis pendens. Tilakdhari Singh* v. *Gour Narain* 5 P L J 715 dissented from.

Venkatramana Chetti v. *Rangiah Chetti,* 41 M L J 399 followed.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Madhavan Nair in S. A. No. 535 of 1921 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bellary in A. S. No. 24 of 1920 (O. S. No. 482 of 1918 on the file of the District Munsif's Court, Hospet).

V. S. Narasimhachariar for appellant.

Venkatrayaliah and Venkatanarasiah for respondents.

The Court delivered the following

JUDGMENT :—The only point raised in this Letters Patent Appeal is "Is a sale deed executed before but registered after the filing of a suit affected by the doctrine of *lis pendens ?*"

The contention of Mr. Narasimhachari for the appellant is that on the date of the filing of the plaint, the property had not passed to the plaintiff inasmuch as the sale deed was

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*L. P. Appeal No. 151 of 1924. 12th December, 1924.

not registered and that the registration of the sale deed, subsequent to the filing of the plaint, amounted to a transfer of the property in suit and therefore S. 52 of the Transfer of Property Act applies to the case. In the case of a conveyance or a document creating title to immoveable property registration is necessary to give validity to such document but the question is whether a document creates title from the date of its execution or whether it creates title only from the date of its registration. S. 47 of the Indian Registration Act makes it clear that " a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. " In a competition between two documents creating title to immoveable property the document earlier in date has precedence over another document later in date but registered before the former document. It is not the registration of a document which operates to create title but it is the document itself. The Registration Act makes valid such documents as soon as they are registered but the right conveyed or transferred is the right which exists in the transferor on the date of the document. When the document is presented for registration the executant simply admits execution whereupon the document is registered and if the executant does not admit execution or if he refuses to appear before the Registrar the law provides for compulsory registration of the document. In such a case it cannot be said that the executant by any act of his gives validity to the document.

The contention of Mr. Narasimhachari is that a sale can be effected only by a registered instrument and that before the date of registration there was no sale and therefore the suit which was filed before the date of registration does stand in the way of the executant registering the document. This argument overlooks the fact that the vendee has a right to compel a vendor to execute a sale deed in his favour and if he refuses to ask the Court to execute the document. If a document has already been executed, he could present it for registration within four months and if no document had been executed he could sue for specific performance of the contract of sale. Such a contract would not be affected by the doctrine of *lis pendens* on account of the filing of a suit subsequent to its date.

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Under S. 52 of the Transfer of Property Act any transfer or other dealing with the property in a suit or proceeding is affected by the doctrine of *lis pendens*. Mere registration of the document cannot be said to be a transfer of the property or dealing with the property in suit. S. 52, therefore, can have no application to the present case where the sale deed was executed before the date of the filing of the suit.

Mr. Narasimhachariar relies upon the case of *Tilakdhari Singh* v. *Gour Narain* (1). There the learned Judges held that a mortgage executed before a suit was filed in respect of the property covered by the mortgage but registered after the filing of the suit was affected by the doctrine of *lis pendens*. With great respect, we are unable to agree with the reasoning of the learned Judges. They rely upon the case of *Ram Prasad* v. *Bhikari Das* (2) as fully supporting the view they take. There was no question of the doctrine of *lis pendens* in the case in *Ram Prasad* v. *Bhikari Das* (2) and it is difficult to see how that case could support the reasoning of the learned Judge in the case in *Tilakdhari Singh* v. *Gour Narain* (1).

In *Venkatramana Reddi* v. *Rangiah Chetti* (3) Sadasiva Aiyar and Spencer, JJ. held that a document creating title in immoveable property executed before the date of the filing of the suit but registered afterwards was not affected by the doctrine of *lis pendens*. The case in *Tilakdhari Singh* v. *Gour Narain* (1) was quoted before the learned Judges and they declined to follow it. It is contended by Mr. Narasimhachariar that the learned Judge's observation as regards the doctrine of *lis pendens* is only obiter and not binding upon us. Even if the point was *res integra* we should have no hesitation in holding that the doctrine of *lis pendens* does not apply to the case of a document creating title in immoveable property executed before the filing of the suit but registered after. We fully concur with the reasoning of Spencer, J. in *Venkatramana Reddi* v. *Rangiah Chetti* (3).

The decision in *Papireddi* v. *Narasareddi* (4) does not apply to the present case. All that was decided in that case was that title to immoveable property could be created only by a properly registered instrument. It is by the execution of a registered instrument that title to immoveable property

1. (1920) 5 P L J 715.
2. (1903) I L R 26 A 464.
3. (1921) 41 M L J 399.
4. (1892) I L R 16 M 464.

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actually passes but that is not a ground for saying that the title passes only on the date of registration. No doubt registration is necessary for giving validity to a document but the right to, or the title to, the property passes from the date of the document even though it be registered some time after its execution or in other words in a competition between two documents one earlier and the other later in date the later document, if registered earlier than the former would have no priority over the former. The mere filing of a plaint either by the executant or by a third person in respect of the property already conveyed would not prevent the vendee from enforcing his rights under the document either by means of compulsory registration or by suing for specific performance. Though under the Indian Law the mere contract of sale does not create a title in the vendee, yet he has the right to enforce the contract ; and his right is as on the date of the contract and not on the date when he enforces it. That being so, the mere fact that a vendor admits the execution of the conveyance before the Registration Officer would not bring his act within the purview of S. 52 of the Transfer of Property Act.

We have no hesitation in holding that the document in question is not affected by the doctrine of *lis pendens*. The Letters Patent Appeal is dismissed.

A. V. V. *L. P. Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

P. K. Veerarayan *alias* Unni Anujan Rajah Avergal and others ... *Appellants* (Counter-petitioners 3 and 4)*

v.

Ayyakutti *alias* Venkatachalam Pattar ... *Respondent (Petitioner).*

Veerarayan v. Ayyakutti.

Civil Procedure Code, S. 102 and O. 41, R. 23—Suit of a Small Cause nature—Execution—Appeal—Remand—Order not open to appeal.

An order of remand made by an Appellate Court in an appeal from an order of the Court executing a decree in a suit of a small cause nature is not appealable. *Mavula Ammal* v. *Mavula Maracair,* (1906) I L R 30 M 212 ; *Sant Prasad* v. *Bhawani Prasad,* (1920) I L R 43 A 403 referred to.

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*A A O No. 222 of 1922. 20th November, 1924.

Veerarayan v. Ayyakutti.

Appeal against the order of the District Court of South Malabar, dated the 16th December, 1921, in A. S. No. 687 of 1921, preferred against the order of the Court of the Subordinate Judge of South Malabar at Calicut in E. P. No. 159 of 1921 in O. S. No. 457 of 1912 on the file of the Court of the District Munsif of Ottapalam.

K. P. Ramakrishna Aiyar and *N. P. Narasimha Aiyar* for appellants.

T. S. Anantaraman for respondent.

The Court delivered the following

JUDGMENT :—No appeal lies in this case, as this is of the nature of a Second Appeal in a matter of execution in a suit which is of the nature of a Small Cause suit. Vide *Aithala* v. *Subbanna* (1) ; *Mavula Ammal* v. *Mavula Maracair* (2) ; *Amba Prasad* v. *Mushtaq Hussain* (3) ; and *Sant Prasad* v. *Bhawani Prasad* (4). It is dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Guntupalli Ramakrishnayya ... *Appellant** (*Plaintiff*)

v.

Guntupalli Pitchayya and others ... *Respondents* (*Defendants* 1, 3 *to* 9, 11, 12, 16 *and* 20, 21 *to* 23, 25, 29 *to* 35, 37, 39 *to* 41, 43 *to* 51 *and* 53).

Ramakrishnayya v. Pitchayya.

Inam—Enfranchisement—Karnam service inam—Grant to a stranger—Rights of office-holder.

Where the Government enfranchised a karnam service inam and granted a portion of the lands so enfranchised to the defendant, a stranger, overlooking the claims of the plaintiff who was then the office-holder, it is not open to the plaintiff to claim the lands from the defendant on the ground that the Government must be presumed to have enfranchised the inam in favour of the office-holder. The enfranchisement in the case of a Karnam service inam amounts to a re-grant of the lands. *Gouri Kantam* v. *Ramamurthi*, 46 M. L. J. 482 followed. *Lakshminarasimham* v. *Venkataratnayamma*, 30 M L T 334 dissented from.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in O. S. No. 39 of 1920.

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*Appeal No. 24 of 1922. 21st November, 1924.

1. (1888) I L R 12 M 116.
2. (1906) I L R 30 M 212 : 17 M L J 376.
3. (1919) I L R 42 A 200.
4. (1920) I L R 43 A 403.

Ramakrishnayya v Pitchayya.

A. Krishnaswami Aiyar for appellant.

G. Lakshmanna, K. Kameswara Rao and *Ch. Raghava Rao* for respondents.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—The plaintiff in this suit seeks to recover certain land which originally formed a portion of a karnam service inam which has since been enfranchised. The plaintiff became karnam in 1908 and this portion of the inam was enfranchised in 1909 in favour of the defendant who admittedly was not an office-holder. The plaintiff continued in office for some years but was then removed and now brings this suit in 1920 to recover the land. He bases his claim on the following facts : He contends that, when the land was enfranchised in 1909, it was enfranchised by Government not for the benefit of the person in whose name the title-deed stands but for the benefit of the office-holder. He being the office-holder at that time must be deemed to have had the land enfranchised for his benefit and it then became his private property. The fact that he is now out of office, therefore, does not affect his right to recover the land. In this argument I think there are two fallacies. In the first place, it necessitates a presumption that, when Government enfranchised this land in favour of the defendant who was not an office-holder, they must be taken to have intended to enfranchise it in favour of the office-holder, although in terms they enfranchised it in favour of a stranger. It is impossible to draw any such presumption when we have the clear terms of the title-deed against it. In the second place, it is based on the assumption that the enfranchisement does not amount to a re-grant ; but in the case in *Venkata Jagannadha* v. *Veerabhadrayya* (1), a decision of the Privy Council, the case of a karnam service inam was specifically distinguished from that of a poligar's inam, and it appears to me that it was held that in a case of a service inam the enfranchisement does amount to a re-grant. This view has been held by a Bench of this Court in S. A. Nos. 287 and 288 of 1921, to which my learned brother was a party, and again by a single Judge, Wallace, J., in *Gouri Kantam* v. *Ramamurthi* (2) and by Devadoss, J., in S. A. No. 322 of 1922. A contrary view

Phillips, J.

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).
2. (1924) 46 M L J 482.

Rama-krishnayya v. Pitchayya.

Phillips, J.

was taken by a Bench of this Court in *Lakshminarasimham* v. *Venkataratnayamma* (3), but the balance of opinion is against that view and I wish to express my concurrence with the majority. If, therefore, the enfranchisement amounts to a re-grant, it cannot be denied that Government can do what they like with the land when they are granting it and, therefore, the grant to the stranger defendant is perfectly justifiable and cannot be impeached by the plaintiff.

In this view the appeal fails and is dismissed with costs.

Odgers, J.

Odgers, J.—I agree. I adhere to the view I expressed in my referring judgment in S. A. Nos. 287 and 288 of 1921 as to the effect of the Privy Council decision in *Venkata Jagannadha* v. *Veerabhadrayya* (1) and also to the view that I expressed there that the decision in *Lakshminarasimham* v. *Venkataratnayamma* (3) cannot be supported.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Sonaimuthu Ambalam ... *Petitioner* (Accused in C. C. No. 8 of 1924 on the file of the Court of the Sub-divisional Magistrate of Ramnad).*

Sonaimuthu Ambalam, *In re.*

Indian Arms Act (XI of 1878), S. 19 (e)—"Going armed"—Meaning of—Essentials of offence—Intention.

The expression "going armed" in S. 19 (*e*) of the Arms Act indicates two things, *i. e.*, an intention to use it and the possibility of using it. For the purpose of a conviction under S. 19 (*e*) there must be some clear evidence of intention on the part of the accused to use the weapon.

Where the evidence in the case showed that there was only one empty cartridge in the fire-arm and no cartridges at all were found on the person of the accused and there was no evidence of his having previously used the weapon, a conviction under S. 19 (*e*) cannot be sustained.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the conviction and sentence of the Court of the Sub-divisional Magistrate of Ramnad in C. C. No. 8 of 1924.

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*Cr R C No. 270 of 1924
(Cr R P No. 226 of 1924). 18th December, 1924.

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).

3. (1921) 30 M L T 334.

Sonaimuthu Ambalam, *In re.*

C. Narasimhachariar and *V. Raghavachariar* for petitioner.
The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The question in this case is whether the accused was properly convicted of the offence of going armed within the meaning of clause (*e*) of S. 19 of the Indian Arms Act (Act XI of 1878). It would appear that he has been discharged under clause (*f*) of the same section of being in possession of arms in contravention of the provisions of S. 14 or 15. I should have thought that the offence of going armed with fire-arm was considerably more narrow than the offence of being in possession merely of fire-arms. The expression "going armed" clearly indicates two things, namely, firstly of an intention to use it as a fire-arm and secondly, the possibility of using it. In this case there was only one empty cartridge in the weapon and no cartridges at all have been found on the person of the accused. This alone would show that, in the circumstances under which he was found to be in possession of the fire-arm, it would not be possible for him to use the weapon as a fire-arm. Further, in my judgment, for the purpose of conviction under clause (*e*) of that section, there must be some clear evidence of intention on the part of the accused to use the weapon. That element is absolutely lacking in the present case. If there had been some evidence of his having at least previously used it there would have been proof of an intention at the time when the accused was charged with having committed the offence. But in the absence of any evidence whatever bearing on the intention of the accused to use it as a fire-arm, I think it is clear that the conviction of the accused under that clause was wrong. The conviction and sentence are, therefore, set aside and the fine, if already paid, will be refunded to the accused. The order of confiscation, dated 29th February, 1924 will be set aside and the fire-arm will be restored to its owner if he has still got a license.

T. S. V. *Conviction and sentence set aside*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Chinna Manikam *alias* Chinnappa Naicken and others ... *Petitioners** (*Accused Nos.* 1 *to* 5, 8, 10, 12, 17 *and* 18).

Chinna Manikam, *In re.*

Criminal Procedure Code, S. 424—*Appellate judgment—Several accused—Special evidence against each to be separately considered.*

Where in a Criminal Appeal there are a number of appellants, it is the duty of the Court to bring to bear, with regard to each of them, a judicial mind for the purpose of considering whether he was guilty or not, having regard to the charges against him and the special evidence directed to him, and his particular defence, if any. *In re, Bapu Naidu,* 2 L W 958 ; and *In re, Thakshinamurthi Rajali,* (1918) M W N 129 followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the sentence of the Court of the Sub-divisional Magistrate of Saidapet in Criminal Appeal No. 1 of 1924 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Madurantakam in Case No. 361 of the Calendar for 1923.

C. Narasimhachari for *G. Thiruvenkatachariar* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The accused-petitioners before me were convicted along with 20 others of the offences of rioting and hurt by the Magistrate who heard the case. The Magistrate convicted the 20 accused, and on appeal the Appellate Magistrate acquitted 10 out of the 20. It is now argued before me that the learned Appellate Magistrate has not considered the case of each of the petitioners separately and come to a conclusion with regard to his guilt or otherwise. On a careful consideration of the judgment of the Appellate Magistrate I am satisfied that he did not bring to bear, with regard to the case of each of these accused, a judicial mind for the purpose of considering whether he was guilty or not having regard to the charges against him and the special evidence directed to him and his particular defence if any. It has been held by Ayling, J., in the case of *In re, Bapu Naidu and ten others* (1) that though the Appellate Magistrate may give satisfactory rea-

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*Cr. R. C. No. 136 of 1924. 5th December, 1924.
(Cr. R. P. No. 119 of 1924).

1. (1915) 2 L W 958.

Chinna Manikam, *In re.*

sons for accepting the conclusions of the Original Magistrate, his omission to consider the case against the individual accused separately would vitiate the judgment. To similar effect is the judgment of Kumaraswami Sastri, J., in the case *Thakshinamurthi Rajali and others* (2). The Calcutta High Court seems even to have gone further and stated in the case of *Arindara Rajbunshi and others* v. *The King-Emperor* (3) that the judgment of the Appellate Magistrate should be self-sufficient, that is to say, should contain all the necessary materials to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused having regard to the various offences with which each of the accused was charged and to enable the High Court to come to a conclusion as to the correctness of the sentence upon each of the accused. The learned Public Prosecutor has drawn my attention to certain words in the judgment of the Appellate Magistrate which go to show that he found the conclusions arrived at by the Original Magistrate to be correct. But that would obviously be insufficient in view of the decisions just now referred to by me. After stating that the analysis of the evidence made by the Lower Court was correct and that on that footing the ten petitioners before me were guilty the Appellate Magistrate proceeds to say thus :—"The defence evidence is untrustworthy as analysed by the Lower Court and does not also help the appellants above mentioned referring only also 1, 3, 4, 6, and 11." This sentence is rather difficult to understand, but assuming that it means that the defence evidence had relation only to five of these ten petitioners, still it would not go to show that he considered judicially the evidence adduced for the defence in respect of these five accused. On the whole regarding the judgment in its entirety, I am not satisfied that the Appellate Magistrate brought his judicial mind to bear on the evidence in the case of each of these petitioners separately. His decision was therefore wrong, I set it aside and remand the case to the Joint Magistrate of Chingleput for entertaining the appeal of these ten petitioners and disposing of the same according to law. Such of the petitioners as have been sentenced to terms of imprisonment will continue to be on bail till the disposal of the appeal on the same security as has been furnished by them.

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2. (1918) M W N 129.

3. (1916) 20 C W N 1296.

Chinna Manikam, *In re.*

I might also point out that the Appellate Magistrate has nowhere referred to the common object of the unlawful assembly by reason whereof the petitioners have been convicted of the offence of rioting. It may be that this matter was not clearly argued before the Appellate Magistrate in the first instance. For the purpose of arriving at a proper decision with regard to the case of these petitioners it would be necessary to find whether these ten persons were really guilty of the offence of rioting as having formed members of an unlawful assembly with a common unlawful object. The execution of the sentences of fine imposed on the petitioners should be suspended till the disposal of the appeal.

T. S. V. *Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Balaguruswami Naicken ... *Appellant* (Counter-petitioner—Defendant)*

v.

Guruswami Naicken and others... *Respondents (Petitioners—Plaintiffs)*

Balaguruswami Naicken *v.* Guruswami Naicken.

Limitation Act, S. 20 and Art. 182 (5)—Execution of decree—Saving of limitation—Payment of a portion of the decree amount out of Court—Application for payment—If a step-in-aid.

A mortgage decree was passed on 14th September, 1916, and the first application for execution was filed on 25th September, 1917, and dismissed on 17th October, 1918. The next application for execution was filed on 9th March, 1923 and the decree-holder relied on a payment made to him by Court by a cheque on 1st April, 1920, in pursuance of an order, dated 31st March, 1920, as saving limitation for execution of the decree. The money in Court had been paid by a mortgagee of the judgment-debtor who had been directed to pay off the decree amount. *Held,* that the application for execution was barred by limitation.

Where an amount of money is in Court to the credit of a suit and such amount is not the proceeds of execution, an application for payment out cannot be said to be an execution application or a step-in-aid of execution. But if the money in Court was realised by the execution of the decree an application by the decree-holder for payment out is a step-in-aid of execution. *Kerala Varma Valia Raja* v. *Shangaram,* I L R 16 M 452 ; *Koomayya* v. *Krishnamma,* I L R 17 M 165 referred to.

An application to be a step-in-aid of execution should be one made in a pending execution application. *Kuppuswami Chettiar* v. *Rajagopala Aiyar,* I L R 45 M 466 relied on.

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*A A O No. 96 of 1924. 19th December, 1924.

Balaguru-swami Naicken v. Guruswami Naicken.

It could not be said in this case that the payment by Court towards the decree amount was made by a person duly authorised on behalf of the Judgment-debtor so as to save limitation under S. 20 of the Limitation Act. *Govinda Pillai* v. *Dasai Goundan*, I L R 44 M 971 : 41 M L J 423 distinguished.

Appeal against the order of the Court of the Subordinate Judge of Coimbatore, dated the 20th December, 1923, in E. P. No. 116 of 1923 in O. S. No. 64 of 1915.

Watrap S. Subramania Aiyar for appellant.

T. M. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The question involved in this appeal is whether the execution of the mortgage decree in favour of the plaintiffs is barred by limitation. The Subordinate Judge held that the application for execution presented by the plaintiffs is not barred by limitation and the defendant has preferred this appeal.

The mortgage decree in favour of the plaintiffs was passed on 14th September, 1916. An execution application was filed on 25th September, 1917. It was dismissed on 17th October, 1918. The present application is dated 9th March, 1923. The contention of the plaintiffs is that a certain sum of money in Court was paid out to them by order dated 31st March, 1920 and the cheque was actually issued on 1st April, 1920 and that their application is therefore within three years from the date of the order for payment out. On the other hand Mr. Subramania Aiyar for the appellant contends that the application for payment out of the sum of money in Court is not a step-in-aid of execution and therefore plaintiffs' application for execution is barred. The defendant's guardian obtained leave of the Court for mortgaging the defendant's property for the purpose of raising money to pay off the plaintiffs' debt. Sanction was given to the guardian to raise money in 1917 and on 14th October, 1918 he hypothecated the defendant's properties to one Kasturi Naicker by Ex. I. The recital in Ex. I is : " Particulars of receipt of the said amount Rs. 17,690 is the amount received by way of direction given (to you) for settling and discharging the sum (payable) under the decree obtained against the said minor by Appanaickenpettai K. Guruswami Naicken and others in O. S. No.64 of 1915 on the file of the said Sub-Court and for obtaining receipt and retaining it as a title-deed herefor." The mortgagee seems to have paid the amount into Court on 19th

Balaguru swami Naicken v. Guruswami Naicken.

March, 1920 whereupon the plaintiffs applied for an order for payment out.

The question is whether in the circumstances an application for an order for payment out by the Court is a step-in-aid of execution. It is well settled that an application for payment out of money in Court by a decree-holder is a step-in-aid of execution if the money in Court was realised in execution of the decree. *Venkatarayulu* v. *Narasimha* (1), *Kerala Varma Valiya Rajah* v. *Shangaram* (2), *Koomayya* v. *Krishnamma Naidu* (3) and *Begunchand* v. *Mugat Rao* (4). In this case the money in Court was not realised by the execution of the plaintiffs' decree. The plaintiffs' execution petition was dismissed so far back as 17th October, 1918. The money was paid into Court to the credit of the suit and the plaintiffs applied for payment to them of the amount in Court. Where an amount of money is in Court to the credit of a suit and such amount has not been the proceeds of execution an application for payment out cannot be said to be an execution application or an application in aid of execution. In such a case the plaintiff has to only apply to the Court for payment and the Court makes the payment without reference to the judgment-debtor in the suit. By asking for payment of the amount in Court, the plaintiff does not do anything to aid the execution of the decree. Where money is realised in execution of the decree he has to ask the Court for an order to pay the money to him, and the Court, after considering whether there are other claimants in respect of the amount, passes an order in favour of the applicant. Such an order is a step-in-aid of execution. But, where the money is to the credit of the suit and all that is required of the plaintiff is to make an application for payment, it cannot be said that what he does is a step-in-aid of the execution of the decree.

In *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (5) Ayling and Venkatasubba Rao, JJ. held that an application to be a step-in-aid of execution should be one made in a pending execution application. Ayling, J., in delivering the leading judgment of the case, differed from an observation of Ramesam, J., that there

1. I L R 2 M 174. 2. (1892) I L R 16 M 452.
3. (1893) I L R 17 M 165 : 3 M L J 296.
4. (1896) I L R 22 B 340.
5. (1921) I L R 45 M 466 : 42 M L J 303.

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is no warrant for the view that an application to take a step-in-aid of execution should be made in execution, meaning apparently until an execution is pending. The application for the transfer of a decree from one Court to another for the purpose of execution is a step-in-aid of execution; and the application is in the form of an ordinary execution application with the prayer that the decree be transmitted to another Court for execution. Such an application is a step-in-aid of execution. In such a case it is necessary that the decree should be transferred to another Court for the purpose of execution; and therefore what is done in order to execute the decree is considered to be a step-in-aid of execution. But where the act of the plaintiff is not in furtherance of execution or in a pending execution, his act cannot be said to be one in aid of execution.

Mr. Krishnaswami Aiyar for the respondents relies upon *Thangishethithi* v. *Doya Shethi* (6) as supporting his contention that the order of the Court for payment out is a step-in-aid of execution. That case is distinguishable from the present case, as in that case an order of the Court was necessary for paying out to the plaintiff the amount of Rs. 500 paid into Court as security for costs. There the learned Judges observed as the money was deposited only as a security an order of the Court was necessary to make it available for payment towards the decree amount. An application for such a purpose and for payment out of the money is thus clearly necessary ; and such an application is one in execution of the decree itself. In this case as we have have already observed no such order was necessary in order to enable the plaintiffs to draw out the money standing to the credit of the suit.

If payment is made to the decree-holder by the judgment-debtor or by anybody on his behalf, or by the Receiver appointed by the Court to be in charge of the defendant's properties, it would not amount to a step-in-aid of execution. In *Appuswami Naicken* v. *Kotha Naicken* (7) it was held that payment by the Receiver appointed by a Court out of the rents and profits of the defendant's properties was not a step-in-aid of execution. The Receiver was not appointed for the purpose of execution ; he was appointed during the pendency of the suit, and the Court paid to the plaintiff the amount that was collected by the Receiver and paid by him into Court.

6. (1917) 35 M L J 375. 7. (1899) I L R 22 M 448.

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The learned Judges observed at page 452 : "We do not think that it can be properly said that such money was collected or paid in execution of the decree though no doubt it was as a consequence of the decree that the appellants became entitled to it. The appellants in demanding the payment of these current profits of the estate did nothing towards the execution of the decree, for the decree did not deal with these profits." In the present case the mortgagee paid into Court a sum of money which he was directed to pay directly to the decree-holder ; and the Court paid the money out to the plaintiffs on their applying for it. The Court, therefore, simply acted as the agent of the mortgagee and not as a Court executing the decree. Jackson, J., in a recent case in *Narayana Nair* v. *Kunhiraman Nair* (8) observed that the mere payment however is not a step-in-aid of execution and it is only a petition put in to certify such payment that can constitute a step-in-aid of execution such as will give a fresh starting point of limitation under Art. 182 of the Indian Limitation Act. We hold that in this case the payment out by the Court to the plaintiffs on their application on 31st March, 1920 is not a step-in-aid of execution and the plaintiffs' application therefore is barred by limitation.

The next contention is that the payment towards the decree amount was made by a person duly authorised on behalf of the defendant and such payment having been made by the Court as the agent of the judgment-debtor and the payment appearing in the handwriting of the person making the same by reason of the cheque having been signed by the Court, the terms of S. 20 of the Limitation Act have been satisfied and therefore the application is within time. In the first place it is to be noted that the mortgagee was not authorised to pay the amount into Court. The terms of Ex. I are clear. The guardian of the defendant did, with the sanction of the Court, execute Ex. I, a mortgage in favour of Kasturi Naicker and directed him to pay the amount to the plaintiff and obtain a receipt from him and to retain it as a title. The mortgagee, therefore, was not authorised to pay the money into the Court. Secondly, the document was executed on 14th October, 1918, and the mortgagee was asked to pay the amount without any delay, for in the particulars of consideration the recital is " Rs. 17,690, the amount received by way of direction given

8. (1924) 20 L W 190.

Balaguru-swami Naicken v. Guruswami Naicken.

(to you) for settling and discharging the sum (payable) under the decree obtained against the said minor by Appanaickenpettai K. Guruswami Naicken and others in O. S. No.64 of 1915," etc. The mortgagee, therefore, was not authorised to keep money with him for a considerable time, *i. e.*, for more than a year and a half, and then to pay it into Court. The agent who can give the creditor the benefit of S. 20 has to act within the terms of his authority. If he exceeds his authority or does something which is not actually covered by his authority he cannot bind the principal so as to give the creditor the benefit of S. 20 of the Limitation Act. We think this case comes within the principle of the decision in *Linsell* v. *Bonsor* (9). In that case the defendant's agent had instructions to offer the claimant a part of the debt in discharge of the whole. The claimant refused to take the money on those terms and the agent paid it in part discharge. It was held that this was not a part-payment by defendant to take the case out of the operation of the Statute of Limitations. In *Alagappa Chettiar* v. *Subramania Pandia Thevar* (10) it was held following *Linsell* v. *Bonsor* (9) that though the mortgagee had authority to pay off the debt in full, he had no authority to make a pure payment of interest as such so as to bring the case within S. 20 of the Indian Limitation Act.

Mr. T. M. Krishnaswami Aiyar relied upon in *Govinda Pillai* v. *Dasai Goundan* (11) as supporting his contention. In that case a certain amount paid by the Government under the Land Acquisition Act into Court was paid out to the decree-holder. It was held that the payment of that amount was part-payment of the principal of the decree debt and the judgment by whose order the payment was made was an agent duly authorised by the judgment-debtor to make it and the fact of the payment appeared in the handwriting of the Judge within S. 20 of the Limitation Act. This case is distinguishable from the present case on the facts. In that case a portion of the hypothecated property was acquired by the Government under the Land Acquisition Act, and Rs. 3,400 was deposited in Court for the Government to the credit of the suit and the decree-holder drew the amount from Court. There the money was paid into Court by the Government under the provisions of the Land Acquisition Act. Seeing

9. 2 Bing N S 241 : 132 E R 95.

10. (1924) 26 M L J 509.

11. (1921) I L R 44 M 971 : 41 M L J 423.

Balaguruswami Naicken v. Guruswami Naicken.

that the land acquired was subject to a mortgage and there was a decree for the sale of the property, the Government paid the compensation for the land acquired into Court as it was bound to do. In the present case the mortgagee was not required by the mortgagor to pay money into Court. He chose to pay into Court out of his own sweet will and pleasure when it suited him. In the first place he had no power to pay it nearly one and a half years after the execution of Ex. I, and, in the second place, he was not asked to pay the amount into Court but was asked to pay the money directly to the decree-holder and obtain a receipt from him. Therefore he was not a person specially authorised to pay the amount into Court so that it may be paid out to the decree-holder. This point also is found in favour of the appellant.

In the result the appeal is allowed and the order of the Subordinate Judge is set aside with costs throughout.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Veerappa Goundan, minor, through his grandfather and next friend Alagia Goundan ... *Petitioner* (Petitioner —Plaintiff)*

v.

Veerappa Goundan and others ... *Respondents (Counter-petitioners—Defendants 1 to 7).*

Veerappa Goundan v. Veerappa Goundan.

Civil Procedure Code, S. 151—Preliminary decree for partition and mesne profits—Final decree omitting to award mesne profits—Application for review dismissed—Subsequent application for further final decree—If lies—Dismissal of application—Order if revisable—Civil Procedure Code, S. 115.

The preliminary decree in a partition suit directed partition and awarded the plaintiff mesne profits. It was confirmed in appeal. Meanwhile a final decree was passed, but that omitted to award mesne profits. An application made to amend the final decree either by way of amendment or by way of review was dismissed and it was neither appealed against nor sought to be reviewed. Subsequently an application was put in under S. 151, Civil Procedure Code, to pass a further final decree for mesne profits. This too was dismissed, whereupon the plaintiff applied to the High Court in revision. *Held* (1) treated as an application for a final decree, the order thereon would amount to a decree and being appealable, no revision lay. *Subbalakshmi Ammal* v. *Ramanujam Chetty,* 35 M L J 552 followed.

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*C. R. P. No. 1077 of 1923. 12th December, 1924.

Veerappa Gounden v. Veerappa Goundan.

(2) the omission to award mesne profits in the final decree must be deemed to be a refusal of the same and as the plaintiff did not appeal against the order, and the review petition having been dismissed, the dismissal was accepted as final, there was no scope for invoking the inherent jurisdiction of the Court.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order, dated 19th April, 1923, of the Court of the Subordinate Judge of Dindigul in I. A. No. 47 of 1923 in O. S. No. 29 of 1918 on the file of the Court of the Temporary Subordinate Judge of Madura.

S. Panchapagesa Sastri for petitioner.

P. N. Appuswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—In this case a preliminary decree for partition and for mesne profits was passed in favour of the plaintiff, and this was confirmed in appeal, the original decree being dated 11th December, 1919, and the appellate decree 21st February, 1922. Meanwhile the final decree had been passed by the Trial Court on 15th September, 1920; and in this final decree the partition was decreed in accordance with a memorandum put in by the parties, and no relief was given in respect of the mesne profits. Seven or eight months after the passing of the appellate decree confirming the preliminary decree, an application was made to the first Court to amend the final decree either by way of amendment or by way of review on the ground that the final decree had omitted to give relief which had been allowed in the preliminary decree. That petition was dismissed and no appeal has been preferred against it, nor any application to review that order ; subsequently an application was put in under S. 151 of the Code of Civil Procedure asking for a further final decree for the mesne profits awarded in the preliminary decree. Objection is now taken by the respondent that this petition will not lie. If the application is treated as an application for a final decree in the suit, the order on such application must be treated as a decree and an appeal will lie. This is the view taken by this Court in *Subbalakshmi Ammal* v. *Ramanujam Chetti* (1) ; and apparently no appeal lies to this Court.

Apart from this the argument proceeds on the assumption that the final decree of 15th September, 1920, is partly a

1. (1918) 35 M L J 552.

Veerappa Goundan v. Veerappa Goundan.

final decree and partly a preliminary decree, *i. e.*, it was final as regards partition and preliminary as regards mesne profits. Inasmuch as there is no mention whatever of mesne profits in the decree, it is difficult to understand this view. It purports to be a final disposal of the suit. The mere omission to refer to one of the reliefs asked for cannot make the decree a preliminary decree in respect of that relief. The omission must be deemed to be a refusal of the relief, whether it was done intentionally or accidentally, and it was open to the party to apply for a review of this decree, or to appeal against it. He did not appeal ; his review petition was dismissed and he accepted the dismissal. Now he comes in with this further application under S. 151 ; but there is no authority and no sufficient ground for invoking the inherent jurisdiction of the Court, the whole matter having been previously disposed of in accordance with law and no objection having been taken.

The only other ground urged before this Court is that, as the plaintiff is a minor, he should be treated with the greatest indulgence. When as in this case an application by a major cannot be granted I know no reason for granting a similar application by a minor. It will be open to him on attaining majority to take any steps that he thinks fit on account of his guardian's alleged negligence of which there is at present no evidence. No action need be taken now.

I must hold that, as the petition is framed, no revision petition lies, as there could have been an appeal ; and on the merits there is no reason to interfere.

The petition is accordingly dismissed with costs.

T. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Sudalimuthu Pillai *alias* Appavu Pillai and others ... *Petitioners** (*Plaintiffs* 2 *to* 5)

v.

Peria Sundaram Pillai and others ... *Respondents* (*Defts.*)

Sudalimuthu Pillai v. Peria Sundaram Pillai.

Court Fees Act (*VII of* 1870), *Sch. II, Art.* 17 (*vi*)—*Scheme suit—Misappropriation of trust moneys by defendants—Estimated amount claimed—Court-fee payable—Order demanding* ad valorem *fee—Civil Procedure Code, S.* 115—*Interference in revision—Practice of the Madras High Court.*

*C R P No. 250 of 1924. 19th November, 1924.

Sudalimuthu Pillai v. Peria Sundaram Pillai.

In a scheme suit under S. 92, Civil Procedure Code, the plaintiffs claimed among other reliefs that the defendants should be made to refund to the trust a sum of Rs. 11,000 which was estimated to be the amount misappropriated by them and also that they should hand over certain properties in their possession to the new trustees to be appointed under the scheme. A Court-fee of Rs 10 was paid on the plaint, but the Court directed the plaintiffs to pay *ad valorem* duty on the valuation put on the several reliefs. *Held* the reliefs for refunding money misappropriated and for possession of properties cannot be treated as part of the subject-matter in dispute between the parties but were merely ancillary reliefs, nor did the plaintiffs claim any beneficial interest in the same. The suit would fall under Sch. II, Art. 17 (*vi*) of the Court Fees Act and the Court-fee paid was sufficient. *Ramrup Das* v. *Mohunt Sitaram Das* 12 C L. J. 211 followed ; observations in *Srinivasa* v. *Venkata,* I. L. R. 11 Mad 148 held to be *obiter dicta.*

In cases in which trial Courts wrongly order payment of Court-fee over and above what was paid on the plaint, it has been the practice of the Madras High Court to interfere with the order in revision, without leaving the aggrieved party to the cumbrous remedy of filing an appeal after the plaint is rejected for non-payment of the amount directed to be paid. The question is really one of jurisdiction as the plaint has to be rejected if the stamp duty is not paid.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Additional Subordinate Judge of Tinnevelly, dated the 21st March, 1924, in O. S. No. 17 of 1921.

S. Ramaswami Aiyar for petitioners.

P. V. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—This is an application under S. 115, Civil Procedure Code, to revise an order passed by the Additional Subordinate Judge of Tinnevelly declaring that *ad valorem* Court-fee on Rs. 11,000 was payable on the plaint presented to him by the petitioner before me in this Court. The plaint was one under S. 92 of the Code, and in the plaint he asked that the defendants should be made to refund to the trust the sum of Rs. 11,000 at which figure he estimated the amount misappropriated by them. He also asked that certain properties in the possession of the defendants should be handed over to the new trustees to be appointed under the scheme to be framed by the Court, and these properties were valued at Rs. 90 at 5 times the annual assessment of the lands described in the schedule. The figure 11,000 was arrived at in this manner. He actually paid a stamp duty only of Rs. 10 on the plaint as for a declaration and urged that the other reliefs

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which he claimed in the plaint were not capable of valuation because he was not asking that the property should be handed over to himself and because he claimed no beneficial interest in those reliefs. The Subordinate Judge has held that the plaintiff was bound to pay Court-fees on those reliefs as they formed part of the subject-matter in dispute. It seems to me that this view is not correct. The plaintiff does not claim any beneficial interest in these sums, but only says that on going through the accounts a sum which he estimates at Rs.11,000 would be found due by the trustees to the trust and that the trustees should be asked to make good to the trust itself that amount of money and hand over possession of the immoveable property. In such a case, we cannot treat those reliefs as being part of the subject-matter in dispute between the parties, they are merely ancillary reliefs. The case is covered by the ruling in *Ramrup Das* v. *Mohunt Sitaram Das* (1). I respectfully follow the view taken in it by the learned Judges of the Calcutta High Court. No doubt, as pointed out by the Subordinate Judge, there is an observation in *Srinivasa* v. *Venkata* (2) that if damages on account of misappropriated moneys are claimed, Court-fees will have to be paid on such amounts. But these observations were unnecessary for the purpose of disposing of that case, and were only *obiter dicta;* and therefore I do not think that I am bound by those observations. It would be a hardship to worshippers who bring suits under S. 92 in order to see that the trusts are properly carried out and that the trustees do not misappropriate the moneys belonging to the trust or abuse the trust, to have to pay Court-fees upon such large sums of money. It will practically prevent them from bringing such suits. I am therefore inclined to think that this Court should take a lenient view as regards Court-fees with reference to claims of this sort. As it seems to me that the relief claimed clearly falls under Art. 17 (vi) of the 2nd schedule to the old Court Fees Act, which was in force when the plaint was filed, there is no reason why the plaintiff should not be allowed to file the plaint on a ten rupees stamp. The view taken by the Calcutta High Court in the case above quoted seems to me to be the proper view. My attention has been drawn to *Omrao Mirza* v. *Jones* (3) but that case was not one under S. 92 so far as can

1. (1910) 12 C L J 211. 2. (1887) I L R 11 M 148.
3. (1884) I L R 10 C 599

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be gathered from the report. If it is supposed to lay down a rule which is in conflict with the ruling in *Ramrup Das* v. *Mohunt Sitaram Das* (1), I think we should prefer to follow the later decision of the Calcutta High Court. *Omrao Mirza* v. *Jones* (3) was cited to the learned Judges in *Ramrup* v. *Mohunt Sitaram Das* (1) as appears from the arguments of the counsel before them, but no reference is made to it in the judgment. *Thakuri* v. *Brahma Narain* (4) has also been brought to my notice but it is easily distinguishable. In fact in that case the learned Judges held at page 63 that Court-fee need not be paid upon any claim for damages as part of the account asked for under S. 92 and they distinguish the cases in *Delroos Banoo Begum* v. *Ashgur Ally Khan* (5) and *Omrao Mirza* v. *Jones* (3) already referred to. They, no doubt, say that if a prayer for an injunction against interference was added and if that is valued, Court-fee ought to be paid for it. Whether that portion of the decision is correct or not, it is not necessary for me to say, for, there is no such claim put forward in this case. The Subordinate Judge has referred to 37 M.L.J. 447. But there does not seem to be any case in that report, having any bearing ; there is clearly some error here. With reference to the new Court Fees Act, there is a clear ruling by Venkatasubba Rao, J., in *Ramanuja Naidu* v. *Alagappa Chettiar* (6) in which he held in a case exactly similar to the present that a single Court-fee of Rs. 50 only need be paid. I should have been content merely to follow that case in deciding this case, had it not been for the fact that this case arises not under the new Act but under the old Act. It seems to me that the tendency has been in such cases to hold that a Court-fee of Rs. 10 is sufficient and the Legislature has now made it clear that extra Court-fees are not payable even though claims are made for accounts to be taken and for moneys to be paid by the defaulting trustee to the trust fund if he had misappropriated them. I hold that the Court-fee of Rs. 10 paid on the plaint is sufficient in this case.

It was also argued that whatever might be my opinion in the case, I should not interfere in revision as the parties have another remedy by way of appeal to the proper appellate Court if the plaintiff refuses to pay the Court-fees and gets

1 (1910) 12 C L J 211. 3. (1884) I L R 10 C 599.
4. (1896) I L R 19 A 60. 5. (1875) 15 Beng L R 167.
6. (1924) 47 M L J 656.

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the plaint rejected. No doubt, there is such a remedy. But it seems to me to be a cumbrous remedy, for if the plaint is rejected he will have to pay the same stamp duty on appeal. It has been the practice of this Court to interfere in this class of cases in revision and set the matter right, so that no further trouble might arise. No conflict of opinion in this Court on this point has been brought to my notice, although it is true that the Patna High Court has taken a different view. In the case in *Chandramani Koer* v. *Basdeo Narain Singh* (7) the main argument was that the *cursus curiae* of that High Court had been not to interfere under S. 115 in cases of this sort. But in this Court *cursus curiae* has not been in that way at all. Therefore the argument loses much of its force in this Court. It seems to me that it is open to this Court to interfere because the question is really one of jurisdiction as the plaint has to be rejected if the stamp duty is not paid. I am also of opinion that it is desirable that under S. 115, Civil Procedure Code, we should interfere and not leave the party to his remedy by way of appeal. I am therefore inclined to interfere under S. 115 in this case and I do so. The Civil Revision Petition is allowed and the order of the Subordinate Judge is set aside and he is directed to take the suit on his file on the stamp of Rs. 10 already paid, and dispose of it according to law. Costs of this petition and costs in the Lower Court will be dealt with by the Subordinate Judge in his final order.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Chockalinga Chettiar ... *Appellant** (*Defendant in both*)

v.

Muthuswami Chettiar ... *Respondent* (*Plaintiff in both*)

Chockalinga Chettiar v. Muthuswami Chettiar.

Contract Act, S. 242—Partner—Agent remunerated by share in profits—Distinction—Test—Evidence.

An arrangement to share in the profits does not necessarily show that the person who shares such profits is a partner of the firm ; but this fact will have to be considered along with the evidence relating to other characteristics of a

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*Second Appeal No. 1342 of 1923. 27th November, 1924.
(C. M. A. No. 385 of 1923)

7. (1918) 4 Pat L J 57.

Chockalinga Chettiar v. Muthuswami Chettiar.

partnership, such as, sharing of losses, etc., in arriving at a conclusion whether the parties intended to carry on business in partnership.

Where the question was whether the plaintiff was a partner along with the defendant and another as alleged by the defendant, or whether the plaintiff was only an agent as alleged by him in the plaint, *held*, reversing the Court below, on the proper construction of the accounts of the firm, the plaintiff was a partner and not an agent of the defendant.

Second Appeal against the decree of the Court of the District Judge of West Tanjore in A. S. No. 254 of 1921 preferred against the preliminary decree of the Court of the District Munsif of Tanjore in O. S. No. 171 of 1919.

A. A. O. No. 385 *of* 1923.

Appeal against the order dated 6th April, 1923 of the Court of the District Judge of West Tanjore at Tanjore in A. S. No. 71 of 1922 preferred against the final decree in O. S. No. 171 of 1919 on the file of the Court of the District Munsif of Tanjore.

T. V. Muthukrishna Aiyar for appellant.

S. Varadachariar for respondent.

The Court delivered the following

JUDGMENT :—This Second Appeal by the defendant arises in connection with a preliminary decree passed by the District Munsif of Tanjore in a suit instituted by the plaintiff for the recovery of the amount found due to him on settlement of accounts on the ground that he has been an agent under the defendant in a trade which the latter had been carrying on, on the understanding that his remuneration was to be one-fourth of the total profits of each year. The suit was for the recovery of one-fourth share in the profits deducting out of it Rs.488-3-6 due by the plaintiff to the defendant. The defendant-appellant, contended, amongst other things, that the plaintiff was not an agent, that as the plaintiff and one Natesa Chetty not a party to the suit had been trading in partnership business, that plaintiff was entitled to one-fourth share of the profits only on the footing of a partner, that he was bound to bear a proportionate share of the losses like any other partner and that the accounts should be examined on that basis.

The main issue for decision is whether the plaintiff is a partner along with the defendant and another as alleged by the defendant, or whether the plaintiff was only an agent as alleged by him in the plaint. The learned District Munsif, on an examination of the evidence, oral and docu-

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mentary in the case, came to the conclusion that the plaintiff was a partner entitled to one-fourth share of the profits after bearing his due share of the losses of the firm and that the amount due to the plaintiff should be found out on an examination of the accounts of the firm on that basis. In that view he passed a preliminary decree directing the appointment of a Commissioner to examine the accounts and settle the amounts due to the several partners.

On appeal the learned District Judge in a very short judgment came to the conclusion that the plaintiff was not a partner but only an agent of the firm and that the accounts should be examined on the basis that he as an agent was entitled to one-fourth share of the net profits. He, therefore, set aside the decree of the District Munsif and remanded the suit to the Lower Court for passing a final decree in accordance with his finding.

In this Second Appeal only one question has been argued, *viz.*, whether the plaintiff is a partner of the defendant or simply an agent. The learned vakil for the appellant has contended before us that the conclusion of the learned District Judge that the plaintiff is only an agent is based upon a misconstruction of the accounts of the firm and a misreading of the documentary evidence in the case. As the question is one of mixed fact and law, we are entitled to test the correctness of the learned Judge's conclusion by an examination of the relevant evidence in the case and this is what has been done in the course of the arguments by the learned vakils appearing for both the parties.

An arrangement to share in the profits does not necessarily show that the person who shares such profits is a partner of the firm ; but this fact will have to be considered along with the evidence relating to other characteristics of a partnership, such as sharing of losses, etc., in arriving at a conclusion whether the parties intended to carry on business in partnership. Apart from the oral evidence which is not very conclusive, two sets of documents have been referred to in this case—(1) income-tax papers, especially Exs. K and X, and (2) the accounts of the firm. As regards the income-tax papers, it may be said that they do not help the case of the plaintiff very much and are at best only inconclusive. Ex. K, a copy of the income-tax appeal petition preferred by the defendant, no doubt says that he alone carried on his trade

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individually but the K Form notice was issued in the three joint names of the plaintiff, Appavoo Chetti and the defendant. In Ex. X, which is a statement in writing given before the Tahsildar by the plaintiff, he describes himself as a partner of Chockalinga Chettiar, the defendant, and says, "We have been carrying on business in partnership for the last six or seven years." This document is dated the 26th of October, 1918, and the plaintiff has clearly stated in it that he has been carrying on a joint trade. As already stated, these income-tax papers and Ex. J relied on by the learned vakil for the respondent do not enable us to express an opinion one way or the other definitely ; but a perusal of the accounts filed in this case conclusively shows that the plaintiff was a partner with the defendant and not his agent. Three settlements of accounts in this case have been brought to our notice : (1) At the end of the first year accounts were settled and the profits were divided between the plaintiff and the defendant ; (2) in the second year there was no division of the profits ; (3) Ex. II shows the settlement of accounts for three years excluding the first year. These settlements of accounts show that amounts are carried forward from one year to another year and that, in doing so, interest charged on outstandings is taken into consideration as also the value of the stock on hand. What is most important is that the adjustment shows that, in making a division of profits, the profits allotted to each share are set off and adjusted towards the prior debit. It is not satisfactorily explained as to why the plaintiff has been debited with loss. His own case was that the loss of any year should not be taken into consideration against him : but we find that at least one debit for loss had been made to the plaintiff and this has not been satisfactorily explained. The plaintiff is nowhere described as " Kariyam " in the accounts. It appears to us that the learned District Judge has not interpreted the accounts correctly. A perusal of these accounts shows that the plaintiff must have been a partner and not an agent of the defendant.

We therefore set aside the order of the District Judge directing the Commissioner to take an account on the basis that the appellant is an agent entitled to one-fourth share of the profits and remanding the suit to the Lower Court for passing a final decree on that basis. We agree with the District Munsif that the accounts should be examined on the basis

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that the plaintiff is a partner. We, therefore, restore the preliminary decree passed by him. The appellant will get his costs here and in the Court below.

A. A. O. No. 385 *of* 1923 :—The District Munsif, after the passing of the preliminary decree, heard objections and passed a final decree. As that preliminary decree was modified by the District Judge, he set aside the final decree and remanded the suit for a fresh final decree. As we have now set aside his decree passed in appeal against the preliminary decree passed by the District Munsif, the District Judge will have to hear the appeal filed against the District Munsif's final decree and dispose of it according to law. We, therefore, set aside his order for passing a fresh final decree and direct him to hear the appeal against the final decree. We make no order as to costs in this Civil Miscellaneous Appeal.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

L. N. Lakshmana Aiyar and others ... *Appellants** (*Defendants* 1 *to* 6)

v.

V. V. C. Ramalinga Mudaliar and Sons' firm, through their partner Chinnappa Mudaliar ... *Respondents* (*Dfts.*).

Lakshmana Aiyar v. Ramalinga Mudaliar & Sons.

Contract Act, S. 38—Contract for sale of goods—Seller himself contracting to purchase goods from another—Tender of goods not in the physical possession of the vendor—Legality of—Repudiation of contract—Inference from conduct.

On 19th August, 1918, the plaintiffs contracted to purchase from the defendants 50 bales of yarn of a particular brand and made an advance of money. The defendants had themselves agreed to purchase a larger quantity of the yarn from another merchant who had, in his turn, contracted to purchase from the manufacturers. The contract provided for the receipt by the plaintiffs of the bales through the intermediate purchasers in the chain of contracts. On 23rd September, 1918, the defendants wrote to the plaintiffs that two bales according to the contract of 19th August, 1918, had arrived and on 1st October, 1918, they gave intimation of the arrival of another bale. Plaintiffs sent no answer, and consequently, on 11th October, 1918, defendants wrote a reminder in which they said that their vendors had intimated that the goods were ready and that the plaintiffs must take delivery on payment. Similar

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*Appeal No. 223 of 1923. 11th December, 1924.

Lakshmana Aiyar *v.* Ramalinga Mudaliar & Sons.

letters were again written by the defendants to the plaintiffs but the latter sent no reply. In a suit by the plaintiffs for recovery of their advance on the ground that there was a failure by the defendants to deliver according to the contract, *held,* that there was a proper tender of the goods by the defendants. Though the letter dated 23rd September, 1918, written by the defendants to the plaintiffs did not give any description of the bales, still inasmuch as it referred to the contract of the 19th August, 1918, under which the bales were tendered, it amounted to a tender of the contracted goods. The fact that the defendants had not taken actual delivery of the bales of yarn from their own sellers did not vitiate their tender to the plaintiffs.

Bowes v. *Shand,* L R 2 A C 455 ; *Ramier* v. *Runa Cheena Mana Navanna Oona and Brothers,* (1923) 19 L W 654 distinguished.

Having regard to the facts that a tender was made by defendants on two occasions of separate lots of yarn and that on three subsequent occasions, the defendants wrote reminders, in effect fresh tenders, to the plaintiffs, and received no reply at all and also having regard to the falling of the market rate at the time, the defendants were justified in inferring from the conduct of the plaintiffs that they had repudiated the contract. The repudiation did not necessarily forfeit the advance paid by the plaintiffs at the time of the contract but as it was proved that if the defendants had claimed damages they could have made good their claim for a very much larger amount than the advance they received, the plaintiffs' suit for the recovery of the advance was liable to be dismissed.

Appeal against the decree of the Court of the 2nd Additional Subordinate Judge of Madura in O. S. No. 78 of 1922 (Original Suit No. 81 of 1922 on the file of the Court of the Subordinate Judge of Madura).

C. V. Ananthakrishna Aiyar for appellants.

N. Chandrasekhara Aiyar for respondents.

The Court delivered the following

Phillips, J.

JUDGMENTS :—*Phillips, J* :—In this case the plaintiffs have brought the suit to recover the advance of money paid in respect of a contract for yarn. The contract is evidenced by Ex. A and was entered into on the 19th August, 1918. Plaintiffs agreed to purchase 50 bales of Madura Meenakshi Brand Yarn No. 40 at Rs. 14-7-0 per bundle. On the 23rd of September, the defendants sent intimation to the plaintiffs that two bales according to the contract had arrived and on the 1st of October they gave intimation of arrival of another bale. Plaintiffs sent no answer to this intimation and consequently on 11th October, 1918, defendants wrote a reminder in which they said that their vendors Lakshmana Iyer and Sons had intimated that the terms of the contract would be enforced and added " we too give intimation to you accordingly."

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Phillips, J.

In this letter they asked the plaintiffs to pay for and take delivery of the bales at once. A similar request was again made on 16th October, 1918, and finally a third letter was written on 30th November, 1918 asking the plaintiffs to pay the money with interest on receipt of the letter and take delivery of the said bales. After that there was no further correspondence in the matter and what happened has to be inferred from the conduct of the parties. Plaintiffs sent no reply at all to any one of these letters either orally or in writing, but ignored them completely.

The first question we have to determine is whether there was a proper tender of the goods by the defendants. Ex. B informs the plaintiffs that "two bales out of the bales mentioned in our Varthamanam letter of 19th August, 1918, have arrived." An objection to this was taken that it does not give any description of the bales so as to enable plaintiffs to ascertain what the bales were. But inasmuch as it refers to the contract of the 19th August under which the bales were tendered, it is quite clear that it amounts to a tender of contract goods and it was open to the plaintiffs, if they suspected the truth of that assertion, to ask for an inspection or for an opportunity of verifying the facts. As it stands, it is an unconditional assertion by the defendants that the goods tendered were of the description mentioned in the contract and, unless there is anything to show the contrary, we must take it that they were of the description in the contract.

A second objection is taken that the contract provides "for the receipt of bales through the said persons," namely, the purchasing merchants in the chain of contracts, namely, Lakshmana Iyer and Sons, the defendants' vendors, and K. M. Subbier and Sons, the vendors of Lakshmana Iyer and Sons, and it is argued that, unless each of these merchants actually took delivery of the bales and had physical possession thereof, there would be a breach of the contract in delivering those bales. Reliance is placed on *Bowes* v. *Shand* (1) a case in which goods had to be sent by shipments on a particular date and it was held that, when they were shipped on a later date, they did not answer the description in the contract. Another case relied on is *Ramier* v. *Runa Cheena Mana Navanna Oona and Bros.* (2) to which I was a party and it was

1. (1877) L R 2 A C 455. 2. (1923) 19 L W 654.

Lakshmana Aiyar v. Ramalinga Mudaliar & Sons.

Phillips, J.

there held on the recitals in the contract note that it was one of the conditions precedent that there should have been actual delivery to each of the purchasers in turn. The contract in that case is somewhat more particularised than in this and I hold that the language of the contract was such that it was capable of bearing this interpretation of a condition precedent as held by the other Judge in the case, and consequently did not dissent from his view. After hearing arguments in this case I now feel that perhaps I should have given effect to my doubt in the matter, but in this case I am clearly of the opinion that there is no condition precedent as to delivery. The goods ordered were the goods which came from the Mill and those very goods were tendered by the defendants. There can, therefore, be no mistake in the description as was the case in *Bowes* v. *Shand* (1) and also in another case in this Court i. e., *Sivarama Iyer* v. *Subbier and Sons* (3). Here the goods were the same and the only argument that could be put forward is that there was a condition precedent, namely that those goods should be carted from warehouse before they were actually delivered to the plaintiffs. I do not think it can be contended that that was an essential condition of the contract and that simply because goods had not been put into a cart and taken out again two or three times, these goods could be refused as not answering to the description in the contract. A similar case has recently been decided by another Bench of this Court, Appeal No. 150 of 1922, and there the view was taken [dissenting from *Ramier* v. *Runa Cheena Mana Navanna Oona and Brothers* (2)] that physical delivery to each merchant in turn was unnecessary. With that view I agree. The tender, therefore, was good and, by refusing to accept the goods, plaintiffs have committed a breach of the contract.

The next question arises whether by this breach they have repudiated the whole contract. We see that a tender was made on two occasions of separate lots of yarn and that, on three subsequent occasions, the defendants wrote reminders, in effect fresh tenders, to the plaintiffs and received no reply at all. What inference could the defendants draw except that the plaintiffs did not intend to carry out the contract? The market was falling and plaintiffs had good reason for refusing

1. (1877) L R 2 A C 455. 3. (1920) 15 L W 9.
2. (1923) 19 L W 654.

Lakshmana Aiyar v. Ramalinga Mudaliar & Sons.

Phillips, J.

to carry out the contract and, consequently, this was a very legitimate inference. Defendants consequently never tendered any more goods and this fact is sufficient to show that they accepted this repudiation when coupled with the fact that they retained the advance given by the plaintiffs. It is thus clear that they treated the contract as at an end as they were justified in doing. This does not necessarily forfeit the advance paid by the plaintiffs at the time of the contract, but it appears from the finding of the Subordinate Judge that, if defendants had claimed damages they would have been enabled to make good their claim for a very much larger amount than the advance they received; consequently plaintiffs are not entitled to any refund of this advance.

The appeal is allowed and the plaintiffs' suit dismissed with costs throughout.

Krishnan, J.

Krishnan, J. :—I agree with my learned brother that this appeal succeeds and that the suit should be dismissed with costs as ordered by him. My learned brother has dealt with the points raised by the learned vakil before us on the question whether the tender was a proper tender or not. But the learned Subordinate Judge has taken two other objections which may also be noticed ; he says because Exs. B and C, documents under which the intimation of arrival of goods was given to the plaintiffs, did not mention exactly where the goods were and also because they did not show that the defendants had got the bales in their disposal or control, the two letters Exs. B and C could not be treated as proper letters of tender. I am unable to agree with the view taken by the Subordinate Judge. It was not necessary for the defendants to have intimated to the plaintiffs exactly where the goods were to be found. If the plaintiffs wanted to know where those goods were it could have been easily done by their asking as to where the goods were and they could have then gone and inspected the goods. As a matter of fact, they took no steps whatever. They ignored all the letters from the defendants.

As regards the second point there is nothing to show that, if the plaintiffs wanted the delivery of the goods and were prepared to pay for the goods, there would have been any difficulty in giving them delivery. The bales were evidently with Subbier because they were afterwards sold by Subbier and he was under a contract to supply to Lakshmana Iyer and Sons and Lakshmana Iyer to the plaintiffs. This objection could not, therefore, be said to be well founded. The other

objections to the tender have already been dealt with by my learned brother. I may add that for the disposal of this case it is sufficient for us to rely upon the recent ruling of the learned Chief Justice and Srinivasa Aiyangar, J. in Appeal No. 150 of 1922. They held that it was not necessary for the defendants to have actually got physical possession of the bales. The view to the contrary taken by Venkatasubba Rao, J., in *Ramier* v. *Rana Cheena Mana Navanna Oona and Brothers*(2) has not been followed in that case and with all respect to the learned Judge I do not think it is right, if he meant to lay down generally that in all cases of this kind of contract it is necessary for the person selling to get actual possession of the goods before he could make a proper tender. It may be on the facts of that particular case the ruling can be supported; but it is not necessary for me to express an opinion on that point.

Then as regards the tender of the 47 bales which the Sub-Judge thinks should have been tendered I am in agreement with my learned brother that it was not necessary as the repudiation of the contract by the plaintiffs in not having taken delivery of the three bales shows that they were not going to accept any goods at all. Their conduct was not peculiar to the particular three bales, but indicated generally that they were not going to be bound by the contract; and that, for a very good reason, because the market was going down very rapidly and it was in their interests to get out of the contract. It was not necessary on the part of the defendants to have actually sent a notice to the plaintiffs that they were treating the failure to accept delivery of the goods tendered by the plaintiffs as amounting to a repudiation of the whole contract. If they were keeping alive the contract they should have under S. 39 of the Contract Act sent an intimation to that effect, but to accept the breach as putting an end to the contract, further intimation is not necessary. The conduct of the defendants shows that they did accept the breach by failure to accept delivery of the goods as a breach of the whole contract and they subsequently did not treat the contract at all as subsisting. The letter of the 30th November on which much reliance has been placed by the learned vakil for the plaintiffs as showing that the contract was kept alive up to that date does not seem to have such effect. It was a conditional offer

2. (1923) 19 L W 654.

Lakshmana Aiyar v. Ramalinga Mudaliar & Sons.

Krishnan, J

which the defendants made to the plaintiffs to waive the breach committed by the plaintiffs. If the money was paid and delivery taken at once as proposed, no doubt the breach would have been waived, but as the plaintiffs failed to accept the offer it fell through and the original breach of contract remained. In these circumstances, I agree with my learned brother that the contract was broken by the plaintiffs by not taking delivery when the three bales were tendered and their failure showed that they were treating the contract as broken and it was not thereafter necessary for the defendants to tender any goods in pursuance of the contract. The question, therefore, whether goods were available to make such a tender or not is quite irrelevant.

As regards damages, it is clear that, if the defendants were entitled to damages, the same would be much more than the money in their hands as advance paid by plaintiffs. I agree that the suit must be dismissed and the appeal allowed with costs.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Sinnaswami Chetti and others ... *Petitioners** (*Petitioners in Mis. Case No. 34 of 1923 on the file of the Court of the Sub-divisional Magistrate of Erode*)

v.

Pannadi Palani Goundan and others... *Respondents* (*Counter-petitioners in do.*).

Sinnaswami Chetti v. Palani Goundan.

Criminal Procedure Code, Ss. 145, 147—*Applicability—Temple—Possession of—Right to worship in—Dispute as to—Distinction.*

When a dispute arises with reference to the right to worship in a temple the proper section under which action should be taken by a Magistrate to prevent a breach of the peace is S. 147 and not S. 145 of the Criminal Procedure Code. S. 145 would be the proper section where the dispute is really as regards the possession of the temple.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 18th January, 1924 of the Court of the Sub-divisional Magistrate of Erode in Mis. Case No. 34 of 1923.

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*Cr R C No. 122 of 1924
(Cr R P No. 105 of 1924). 27th November, 1924.

Sinnaswami Chetti v. Palani Goundan.

T. M. Krishnaswami Aiyar and *K. Ramaswami Gounder* for petitioners.

K. S. Venkatrama Aiyar for respondents.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—This case arose in connection with the probability of a breach of the peace occurring between the Chetties and the Goundans in Chennakalvalasu, hamlet of Kolathupalayam in Dharapuram Taluq, Coimbatore District, regarding the right of worship in a temple in that hamlet. The Chetties who are the petitioners before me claim it to be a temple common to themselves and to the Goundans. On the other hand, the Goundans claim that the Chetties were not entitled to the temple at all. They, of course, also denied the right of the Chetties to perform worship in this temple. The Magistrate in order to prevent a breach of the peace has taken action under S. 145 of the Criminal Procedure Code and he has found, as regards the possession of the temple itself, that it is in the exclusive possession of one Palani Goundan, one of the members of the Goundans' party.

It has been argued before me that this is not a case which should have been dealt with under S. 145 but that it should have been dealt with under S. 147 of the Criminal Procedure Code, because the Chetties did not really claim possession of the temple but only the right to perform worship in that temple. The right to worship will no doubt require the right of entering into the temple ; except in so far as that right was concerned there was no other dispute. The real dispute between the parties was as to the right to worship in the temple. When a dispute arises with reference to such a right as that, the proper section under which action should be taken by the Magistrate to prevent a breach of the peace is S. 147 and not S. 145. The cases in *Chidambara Gurukkal v. Sengoda Goundan* (1), *Kader Batcha* v. *Kader Batcha Rowther* (2) and *Muhammad Musaliar* v. *Kunji Chek Musaliar* (3) lay down that the proper section is 147. The case cited by the other side, namely *Palaniandi Pandaram* v. *Palaniappa Thevan* (4) is distinguishable from the present case. There the main dispute between the parties was as to the right

1. (1914) 27 M L J 587. 2. (1905) I L R 29 M 237.
3. (1887) I L R 11 M 323 at 326. 4. 34 I C 651.

Sinnaswami Chetti v. Palani Goundan.

of possession of the temple in question. In that case the learned Judge was able to come to the conclusion that the dispute was in effect for possession of the temple and the right to perform puja therein was only a portion of the larger relief claimed ; it was an ancillary relief and therefore it was held by Ayling, J., that S. 145 was the proper section applicable. Where the dispute is really as regards the possession of the temple, no doubt S. 145 would be the proper section. But in this case the dispute is not so much about the right to possession of the temple as to the right to perform worship in the temple. In such a case as that I am of opinion that S. 147 is the proper section to be used by the Magistrate. The finding that the possession of the temple is with Palani Goundan is therefore inadequate to prevent a breach of the peace between the parties ; for that finding does not prevent the Chetties from entering the temple for the purposes of worship. If the dispute still exists as regards their right to worship and it is likely to lead to a breach of the peace, it ought to be put an end to by proper proceedings being taken under S. 147. I therefore allow the Criminal Revision Petition, set aside the order of the Magistrate and direct him to take action under S. 147, Criminal Procedure Code, after giving due notice to the parties. Of course, if the likelihood of a breach of the peace has ceased, no action need be taken. But if it still continues, then the Magistrate will take action under S. 147. The petition is allowed and the case remanded accordingly to the Magistrate.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

The Official Assignee at Madras ... *Appellant** (*1st Deft.*)

v.

Aiyu Dikshithar and others ... *Respondents* (*Plaintiffs 3 and 4 and Defendants 2 and 3*).

The Official Assignee at Madras v. Aiyu Dikshithar.

Civil Procedure Code, Ss. 11 and 47—Parties—Legal representative—Official Assignee if the representative of insolvent judgment-debtor—Test of—Small Cause suit—Order in execution passed on the Original Side—If bars subsequent suit for declaration of title.

While the decree in a suit of a small cause nature was being executed under the Original Side jurisdiction of the Court, an order was passed on a claim

*S. A No. 1441 of 1922. 23rd January, 1925.

petition under S. 47, Civil Procedure Code, that the suit property was liable to be attached in execution of the decree. Subsequently the judgment-debtor became an insolvent and his properties vested in the Official Assignee. In a subsequent suit brought by the defeated claimants for a declaration of title, the Official Assignee and the other parties to the prior decree were impleaded. The former, who claimed the property on behalf of the whole body of creditors, objected that the suit was barred under S. 47, Civil Procedure Code, and also that the order in the prior execution proceedings was *res judicata.*

Held, (1) as the subject-matter of the suit did not relate to the execution of any decree, S. 47 was not a bar to the suit; (2) as the Official Assignee was claiming the property on behalf of all the creditors, he could not be said to be claiming under the judgment-debtor or litigating under the same title. The order in the prior execution proceedings was not binding as between him and the plaintiffs and the suit was not barred under S. 11. The Official Assignee does for certain purposes represent the insolvent, but has also other capacities, and in each case in order to determine what particular character he holds, regard must be had to the circumstances. I L R 7 A 752; 29 C 428 followed; observations in I L R 28 C 419 held *obiter* and not followed; and (3) the order in the prior execution proceedings being made in a suit of a small cause nature cannot in any event operate as *res judicata* in the subsequent suit. The fact that it was passed by the Original Side of the Court in execution would not make any difference.

The following are the material facts of the case :—

S. brought a suit in a Small Cause Court on a pro-note executed by *R.*, an undivided co-parcener, impleading *R.*, his father, and brothers also as parties. He obtained a decree against *R.* alone, the others having been exonerated. In execution of that decree under the original jurisdiction of that Court a house standing in the name of the judgment-debtor was attached. A petition was put in by the brothers of the judgment-debtor, under S. 47, Civil Procedure Code, against the attachment, on the ground that the attached house had become theirs by virtue of an alleged settlement deed executed by the father. This claim was negatived. Pending the claim proceedings, *R.*, the judgment-debtor, put in a petition to the High Court at Madras for adjudicating him an insolvent and he was so adjudicated. The Official Assignee, on behalf of the general body of creditors, wanted to bring to sale the house standing in the name of *R.*, the judgment-debtor insolvent.

The present suit is brought by the 1st plaintiff, the father, and his two sons for a declaration that the suit house is the property of the two brothers and for an injunction restraining the Official Assignee from bringing the suit house to sale. The defence set up by the Official Assignee was that it was barred by Ss. 11 and 47, Civil Procedure Code.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Tanjore in A. S. No. 138 of 1920 (A. S. No. 299 of 1920 on the file of the District Court, Tanjore) preferred against the decree of the Court of the District Munsif of Tanjore in O. S. No. 716 of 1917.

K. S. Krishnaswami Aiyangar for appellant.

T. R. Ramachandra Aiyar and *V. Subramania Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—The only question that has been argued in this appeal is the fourth point in the judgment of the learned Subordinate Judge, namely, whether the suit is barred by S. 47 of the Code of Civil Procedure or Expl. 4 to S. 11. So far as the first portion is concerned it is quite clear that this is not a matter coming under S. 47, for it does not relate to the execution of any decree and it is not seriously contended that this suit should have been brought under S. 47 as an execution petition. The second portion is the point chiefly relied on, namely, that this suit is barred by S. 11 of the Code of Civil Procedure in that there was a prior decision in execution proceedings to which the 2nd plaintiff, the 2nd defendant and the 3rd defendant were parties, when it was held that the suit property was liable to be attached in execution of a decree against the 2nd defendant. So far as that point is concerned it is concluded by the order as between the parties to it but, certainly, the first plaintiff was not a party to these proceedings and the question is whether the 1st defendant, who is the Official Assignee, can be deemed to be the legal representative of the insolvent 2nd defendant within the meaning of S. 11, Civil Procedure Code. In order that it may be binding as between the plaintiffs and the 1st defendant it is necessary that the 1st defendant should claim under the 2nd defendant and be litigating under the same title. The question in issue in the former suit was solely one relating to the execution of a decree in which the 2nd defendant was the judgment-debtor; but in the present proceedings that is not at all the position which the Official Assignee takes. He does not seek to oppose the decree-holder in that suit but wishes to obtain the property for the benefit of the 2nd defendant's creditors and, consequently, I do not think that he can be deemed to be litigating here under the same title as the 2nd defendant in the prior proceedings. The case which seems to be in point here is

The Official Assignee at Madras v. Aiyu Dikshithar.

Kashi Prasad v. *Miller* (1), which seems to be entirely similar and decides that the Official Assignee is not the legal representative in these circumstances. Reliance is placed by the appellant on *Miller* v. *Lukhimani Debi* (2) ; but apart from the fact that the observations are *obiter*, they were expressly withdrawn by the same Judge in a subsequent case, a Full Bench decision, reported in *Frederick Peacock* v. *Madan Gopal and others* (3). No doubt the Official Assignee does for certain purposes represent the insolvent, but he has other capacities such as the representative of the body of creditors; and in each case in order to determine what particular character he holds one must have regard to the circumstances. If in a case he was litigating under the same title under which the insolvent had previously litigated, he might be held to be the legal representative. In the present case I think the Subordinate Judge is right in holding that he is not the legal representative of the 2nd defendant, and certainly he is not the legal representative of any of the other parties to the previous order. The second appeal therefore fails and is dismissed with costs.

The appeal might also be disposed of on another ground, namely, that the prior proceedings were in a suit of Small Cause nature, whereas that is not so in the present case. I do not think that the fact that the order was passed in execution on the original side could give it any higher authority than an order in the proceedings to which it was consequent for S. 11, Civil Procedure Code, is not in terms applicable to such proceedings and can only be applied by analogy.

T. S. V. *Appeal dismissed.*

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1. (1885) I L R 7 A 752. 2. (1901) I L R 28 C 419.
3. (1902) I L R 29 C 428.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

T. A. Balakrishna Odayar and another ... *Appellants** (*Defendants* 1 *and* 2—*Respondents* 1 *and* 2) *in A. A. O. No.* 273 *of* 1922 *and petitioners* (*Defendants* 1 *and* 2) *in C. R. P. No.* 695 *of* 1922

v.

Chakravarthy V. Jagannada Chariar and others ... *Respondents* (*Plaintiffs* 1 *and* 2, *Defts.* 3 *to* 6, 8 *and* 9—*Petitioners* 1 *and* 2 *and Respondents* 3 *to* 6, 8 *and* 9) *in A. A. O. No.* 273 *of* 1922 *and Respondents* (*Plaintiffs* 1 *and* 2 *and defendants* 3 *to* 6, 8 *and* 9) *in C. R. P. No.* 695 *of* 1922.

Balakrishna Odayar v. Jagannada Chariar.

Civil Procedure Code, S. 115—*Findings in pending suit—Interference in revision with—Grounds—Civil Procedure Code, S.* 92—*Suit under, in respect of temple—Trustee or trustees of temple if when may be plaintiff or plaintiffs—Counter-charges against plaintiff-trustee—Investigation of—Removal of such trustee—Jurisdiction as regards—Suit under S.* 92—*Receiver—Appointment of —Grounds—Internecine quarrels between trustees if one.*

Interference in revision with findings in a pending suit is not a matter which the High Court will view with favour, and it will require a very strong proof of want of jurisdiction or irregular exercise of jurisdiction to warrant interference.

A vague apprehension on the part of some of the defendants that the Court will not be able to distinguish the reliefs which the plaintiffs claimed against the other defendants but which they subsequently gave up and those which they retained, or to restrict the evidence at the trial to those reliefs which were still being sought for is no reason for interference in revision.

An alleged misjoinder of some of the defendants is no ground for interference in revision/at the instance of the other defendants, in a case in which neither the plaintiffs nor any of the defendants alleged to have been improperly joined have any objection.

The fact that a suit is not maintainable at all may in some cases be a ground for interference in revision at the instance of the defendants.

There is nothing in S. 92 of the Civil Procedure Code to prevent one of the plaintiffs or even both the plaintiffs being trustees of the temple in respect

*A A O No. 273 of 1922 and C R P No. 695 of 1922. 11th November, 1924.

Balakrishna Odayar v. Jagannada Chariar.

of which the suit under that section is instituted. So long as the plaintiffs, whether trustees or not, are vindicating a public, and not an individual right, the suit is maintainable under S. 92.

In a suit instituted under S. 92, Civil Procedure Code, with the sanction of the Advocate-General for the removal of certain trustees of a temple and for other reliefs, the 1st plaintiff was himself a trustee of the suit temple and the second was a member of the public interested in the trust, *held*, that no objection could be taken to the maintainability of the suit on the ground that one of the plaintiffs was himself a trustee of the suit temple.

S. 92, Civil Procedure Code, gives a wide discretion to the Court as to what it may or may not do in a suit brought under that section. Where, therefore, in such a suit a trustee of the suit temple is himself one of the plaintiffs, and counter-charges are made against him and his removal is prayed for by the defendants-trustees whose removal is prayed for by the plaint, there is nothing to prevent the Court from investigating and recording findings on the counter-charges against the plaintiff-trustee or from removing him.

Where in such a suit it appeared that there were internecine quarrels between the trustees, each charging the other with mismanagement and suppression of accounts, *held*, that it was undesirable that either party should be left in exclusive control of the accounts or in exclusive authority over the temple servants, and that the appointment of a Receiver was just and convenient.

Appeal and petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the orders of the Court of the Subordinate Judge of Kumbakonam in S. A. No. 405 of 1920 in O. S. No. 27 of 1920 and in O. S. No 27 of 1920 respectively.

S. Muthiah Mudaliar and *K. Narasimha Aiyangar* for appellants.

T. M. Krishnaswami Aiyar, S. Panchapagesa Sastri, C. V. Rajagopalachariar, N. Kunjitapadam Aiyar, R. Rajagopala Aiyar and *S. G. Rangaramanujam* for respondents.

The Court delivered the following

JUDGMENT :—In this Civil Revision Petition defendants 1 and 2 in O. S. No. 27 of 1920 on the file of the Sub-Court of Kumbakonam call for the interference of this Court in revision with certain findings of the Lower Court on certain issues in that suit. The suit has not yet been disposed of. Interference with findings in a suit not yet disposed of is not a matter which the High Court will view with favour, and it will require a very strong proof of want of jurisdiction or irregular exercise of jurisdiction to warrant interference. In this case the petitioners have before us restricted their case to three issues, on which the Lower Court has given findings, Issues I, IV and V.

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The suit is one under S. 92 of the Civil Procedure Code for the removal of certain trustees of the Kumbakonam Sri Sarangapaniswami Temple, defendants 1 and 2 and for other reliefs. It is filed by two plaintiffs with the sanction of the Advocate-General. The first plaintiff is himself a trustee of the temple and the second is a member of the public interested in the trust. Issue IV relates to the prayer in the plaint for divesting the Devasthanam Committee of its superintendence over the temple. The plaintiffs have also added as defendants the members of the Committee. Before the Lower Court the plaintiffs did not press that prayer. The petitioners, who are defendants 1 and 2, wish us to interfere now because they are afraid that the Lower Court may not separate this relief from the others prayed for, and thus prejudice their defence. They seem to apprehend that the Lower Court will not be able to distinguish the reliefs which the plaintiffs have given up and those which they retain, or to restrict the evidence at the trial to those reliefs which are still being sought for by the plaintiffs. But we really cannot hold that such a vague apprehension is any reason for interference in revision.

Issue V is an issue on misjoinder. That is with reference to the members of the Devasthanam Committee being added as defendants. How this misjoinder, supposing that it is a misjoinder, damnifies the petitioner, it is difficult to see. The Committee members themselves do not complain. Had any necessary defendants been excluded, those excluded defendants might have had some grievance, but the addition of extra defendants cannot hurt the present petitioners in any way. The three cases cited by the petitioners have no application. *Arunachalam Chettiar* v. *Arunachalam Chettiar* (1) and *Sitaramayya* v. *Ramappayya* (2) were cited. In the former case the plaintiff's suit was liable to dismissal, unless it complied with the order sought to be revised. In the latter the plaintiff was forced to add parties against his will. But, in the present case, neither the plaintiffs nor the added defendants have any objection. *Shunmugha Nadan* v. *Arunachalam Chetty* (3) was also cited. It is a case where defendants, ordered by the Lower Court to be struck out of the records, were added by order of this Court in revision. We cannot hold that these rulings are authorities for the proposition

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1. (1922) 43 M. L. J. 218. 2. (1916) 5 L W 207
3. (1921) I L R 45 M 194 : 42 M L J 97.

Balakrishna Odayar v. Jagannada Chariar.

that the alleged misjoinder in this case is an illegal or irregular exercise of jurisdiction.

We are then left with Issue 1, which contains the only point worth attention, since it refers to the actual maintainability of the suit, and, so far as this suit is concerned, it is a pure question of law. If a suit is not maintainable at all, it might in some cases be advisable for this Court in revision to interfere and thus to prevent further waste of time and money, the ground of interference being that a Court has no jurisdiction to proceed with a suit which is not maintainable in law. From that point of view, we shall consider this issue. The contention is that the first plaintiff, being himself a trustee, is not entitled to be one of the "two persons having an interest in the trust," as required by S. 92 of the Civil Procedure Code. Now, clearly a trustee is a person interested in the trust, and *prima facie,* therefore, there is nothing in the section to prevent his being one of the plaintiffs or even to prevent both the plaintiffs being trustees. Petitioners contend that a trustee cannot be one of the plaintiffs in a suit under S. 92 because the essence of such a suit is relief claimed by the general public against the management and conduct of the body of trustees as a whole, and that therefore the whole body of trustees must be defendants. There is nothing in the section to justify such a narrow restriction of its scope. A suit may be instituted to remove only one trustee and to have another appointed in his place. Here the relief sought for is not against the whole body of trustees but against two trustees only. Such a narrow interpretation of the section will lead to the result that a body of trustees cannot by suit under S. 92 get rid of an obstructive or dishonest trustee who is ruining the institution, unless they persuade two public-spirited men to undertake the trouble and expense of filing a suit.

The petitioners further point out that in this suit they are making counter-charges against the first plaintiff in his capacity as a trustee and asking for his removal, and urge that, if he remains as a plaintiff, the Court cannot investigate and record findings on these counter-charges or remove the first plaintiff, if the Court finds that it is advisable to do so. But we see no such difficulty, since the section itself gives the Court a very wide discretion as to what it may or may not do in such a suit.

Balakrishna Odayar v. Jagannada Chariar.

We have been able to discover one direct authority on this point of law in *Subramania Pillai* v. *Krishnaswami Somayajiar* (4) where a Bench of this Court held that a suit by two trustees to remove a third trustee was a suit under S. 92 of the Civil Procedure Code. We agree with this view. The real plaintiff, by whomsoever it may be represented, is the trust, and the representation may be either by the interested public or by a trustee thereof and, so long as the plaintiffs, whether trustees or not, are vindicating a public and not an individual right, the suit is one maintainable under S. 92. In our view, the present plaint shows that the nature of the present suit is the vindication of a public right and this is also indicated by the fact that one of the plaintiffs is a member of the general public. We hold therefore that the suit is maintainable and there is no case for interference in revision. The Civil Revision Petition is, therefore, dismissed with costs of respondents 1 and 2.

As to C. M. A. No. 273 of 1922 the same petitioners appeal against the order of the Lower Court appointing a Receiver to the temple trust property pending disposal of the suit mentioned above. We need not go into detail in this matter. It is clear from the statement of both parties that there are internecine quarrels between the trustees, each charging the other with mismanagement and suppression of accounts, and the issues in the case will entail an investigation of the charges against each. In these circumstances it is undesirable that either party should be left in exclusive control of the accounts or in exclusive authority over the temple servants. We are not prepared to interfere with the discretion of the Lower Court, which considers it just and convenient to appoint a Receiver in such circumstances. We therefore dismiss this appeal with two sets of costs, one for respondents 1 and 2 and one for respondents who are members of the Devasthanam Committee.

A. S. V. *Petition dismissed.*

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4. (1919) M W N 522.

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT:—VISCOUNT FINLAY, LORD ATKINSON, LORD PHILLIMORE, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

The Secretary of State for India in Council ... *Appellant**

v.

The Great Indian Peninsula Railway Company ... *Respondents.*

P. C.

Secretary of State for India in Council *v.* Great Indian Peninsula Ry. Co.

Conrtact Act, Ss. 239, 242—Partner—Agent remunerated by a share of profits —Agreement between Secretary of State in Council of India and Railway Company for maintenance, management and working of Railway system vested in Secretary of State—Construction—Stores purchased and imported into India by Railway Company for use of undertaking—Liability to Customs duty—Sea Customs Act (VIII of 1878), S. 20, proviso—Applicability.

The defendant Company (the Great Indian Peninsula Railway Company) was incorporated in 1849 by an Act of the Imperial Parliament. By another Act of the Imperial Parliament of 1900 the railways and other property of the defendant Company was transferred to and vested in the Secretary of State in Council of India as and from 30th June, 1900. On 21st December, 1900, an agreement was made between the Secretary of State in Council and the defendant Company, the opening recital of which stated that it had been agreed between the parties that the defendant Company should maintain, manage and work the Great Indian Peninsula system on the terms thereinafter mentioned. Provisions followed which were intended to secure the carrying into effect of the recited agreement for the maintenance, management, and working of the Great Indian Peninsula Railway system. The agreement, however, contained a clause under which the surplus arising from excess of receipts over payments was to belong as to nineteen equal twentieth parts thereof to the Secretary of State and as to one equal twentieth part thereof to the defendant.

On a question arising as to whether stores purchased and imported by the defendant Company into India for the use of the undertaking were exempt from Customs duties under S. 20 of the Sea Customs Act VIII of 1878 on the ground that the goods were, at the time of the importation, goods belonging to Government within the proviso to that section, it was found that the money for the purchase of the stores in question was supplied by the Secretary of State.

Held, that the defendant Company purchased and imported the stores into India merely as agent for the Secretary of State, and that the goods were goods belonging to Government and were therefore exempt from Customs duties.

Under the agreement the Secretary of State and the defendant Company were not co-adventurers or partners, and the defendant Company was merely an agent for the Secretary of State remunerated by a share of the profits.

Appeal from the judgment of the High Court (Macleod, C. J. and Crump, J.) on a case stated, as under, pursuant to O. 36, R. 1 of the Civil Procedure Code (Act V of 1908).

*P C Appeal No. 39 of 1924. 22nd December, 1924.

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Sir Lawrence Jenkins.

A. M. Dunne, K. C. and *K. Brown* for appellant.

Sir G. Lowndes, K. C. and *E. B. Raikes* for respondent Company.

22nd December, 1924. The Judgment of the Board was delivered by

SIR LAWRENCE JENKINS :—This appeal is from a decree dated the 5th April, 1923, of the High Court at Bombay, which followed on a judgment pronounced in a Special Case under O. 36 of the Code of Civil Procedure. The parties to the case are the Secretary of State for India in Council as plaintiff and the Great Indian Peninsula Railway Company as defendant, and the question stated for the opinion of the Court is "Whether stores purchased and imported by the defendant Company into India for the use of the undertaking as mentioned in the case are at the time of the importation, goods belonging to Government." On the decision of this question depends the liability of the defendant Company to pay Customs duties under S. 20 of the Sea Customs Act, VIII of 1878. By this section Customs duties are imposed which would attach to the stores unless they come within the proviso to the section that no such duties shall be levied on goods belonging to the Government. The answer to the question propounded depends largely on the legal effect to be attributed to the provisions of the agreement attached to the special case ; but that this effect may be rightly understood a brief summary of the facts leading up to it is necessary.

The defendant Company was incorporated in 1849 by an Act of Imperial Parliament, 12 and 13 Vict. c. 83. On the 18th August, 1899, the Secretary of State in Council in exercise of powers vested in him gave notice to the defendant Company of his intention to purchase the railway and works that had been constructed together with the telegraphs and the engines, carriages, stock, plant and machinery belonging to the railway and works. On the 30th July, 1900, an Act of Parliament, 63 and 64 Vict. c. 133, intituled an Act to provide for the vesting of the railways and other property of the Great Indian Peninsula Railway Company in the Secretary of State in Council of India and for other purposes was passed. After a preamble stating that notice of the intention to purchase had been given and that it was expedient that arrangements should be made for the future working of the railways of the Company it was enacted that as from 30th

June, 1900, the railways and works should by virtue of the Act be transferred to and vested in the Secretary of State in Council. This then is how matters stood at the date of the agreement attached to the case, and it is to be borne in mind that at its date the Secretary of State in Council had become and was the owner of the railway undertaking and all that pertained to it. The agreement was made on the 21st December, 1900, between the Secretary of State in Council of the one part and the defendant Company of the other part, and in the opening recital it is stated that it had been agreed between the parties that the defendant Company should maintain, manage and work the Great Indian Peninsula system on the terms thereinafter mentioned. This recital is important; it is the key to the meaning and effect of the elaborate provisions that follow; on examination they will be found to be merely ancillary to the recited agreement.

Thus it is for the purpose of the contract that the plaintiff is to hand over to the defendant Company the Great Indian Peninsula Railway system together with the rolling stock, plant and machinery belonging thereto (cl. 5); and for the purpose of the undertaking that he is to deliver to the defendant Company all stores belonging to the Great Indian Peninsula system (cl. 6). There is no derogation here from the property vested in the Secretary of State in Council.

Provisions follow for the maintenance and management of the undertaking which impose on the defendant Company the obligation to keep the undertaking and the rolling stock, plant and machinery belonging to the undertaking in good repair and good working condition to the satisfaction of the Secretary of State (cls. 10 and 11). Then there are provisions as to the use and working of the undertaking and the conveyance of traffic throughout which the ultimate control is with the Secretary of State (cls. 15—22).

Capital money required for the purposes of the undertaking is at his option to be provided by the Secretary of State or be raised by debentures or debenture stock on such terms as he should determine (cl. 22*a*). All money received by the defendant Company in respect of the undertaking is to be paid into the Treasury of the Government of Bombay or such other Treasury as the Secretary of State should direct or into the Bank of England to the account of the Secretary of State: all money required by the defendant Company for the pur-

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poses of the undertaking is to be supplied by the Secretary of State ; and the Secretary of State's sanction is required for all expenditure. (Cls. 23, 24 and 25). The accounts are to be kept in accordance with the Secretary of State's requirements. In all matters relating to the undertaking not specially provided for the defendant Company is subject to the supervision and control of the Secretary of State (cl. 45).

By cls. 49—51 a ban is placed (*a*) on borrowing by the Company, (*b*) on its engagement in any other business, and (*c*) on its acquisition of property in India during the continuance of the contract without the sanction of the Secretary of State. And at the determination of the contract on the 30th June, 1925, the Company is to give to the Secretary of State possession of the undertaking together with the rolling stock, plant and machinery belonging thereto and all stores and other articles specified in cl. 60.

These provisions (in their Lordships' opinion) are for the purpose of carrying into effect the recited agreement for the maintenance, management and working of the Great Indian Peninsula Railway system, and under them the defendant Company is the agent and no more than the agent of the Secretary of State. In so saying their Lordships do not overlook the terms of cl. 39 (4) under which the surplus arising from excess of receipts over payments is to belong as to nineteen equal twentieth parts thereof to the Secretary of State and as to one equal twentieth part thereof in the defendant Company. In their opinion the contention that this points to the Secretary of State and the defendant Company being co-adventurers or partners is not well founded ; the appropriation of one-twentieth to the defendant Company is not to be ascribed to any proprietary interest in it but is a remuneration for services rendered by it as agent for the Secretary of State.

The money for the purchase of the stores to which this case relates was supplied by the Secretary of State and it was as agent for the Secretary of State that the defendant Company purchased and imported the stores into India for the use of the undertaking. In the circumstances the High Court rightly held that the stores at the time of importation belonged to the Government and their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

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There will be no order as to costs.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondent : *Foyes, White, Borrett and Black.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Fort William, Bengal.)

PRESENT :—LORD ATKINSON, LORD SUMNER AND SIR JOHN EDGE.

Barendra Kumar Ghosh ... *Appellant**

v.

The King-Emperor ... *Respondent.*

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Penal Code, Ss. 34, 37, 38, 114, 149—*Scope and effect—Distinction—S.* 302—*Murder in pursuance of a common intention—Person participating in—Liability of—Fatal act if must be done by him—S.* 34—*Criminal act—Meaning.*

S. 34, Indian Penal Code, deals with the doing of separate acts, similar or diverse, by several persons ; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it. S. 37, Indian Penal Code, provides that, where several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.

"A criminal act" in S. 34 means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence. The expression, "in so far as murder is concerned," is not confined to an act which takes life criminally within S. 302, Indian Penal Code.

S. 149, Indian Penal Code, creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, *viz.,* one of those named in S. 141, and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of S. 34, is replaced in S. 149 by membership

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*P. C. Appeal No. 1 of 1924. 23rd October, 1924.

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of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but S. 149 cannot, at any rate, relegate S. 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all.

S. 114, Indian Penal Code, is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime has first been proved, and then the presence of the accused at the commission of that crime is proved in addition. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. S. 114 deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary, not punitory. Because participation *de facto* may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence *plus* prior abetment can mean nothing else but participation. The presumption raised by S. 114 brings the case within the ambit of S. 34.

Even if it be the case that an accused could have been convicted as an abettor, present at the commission of the offence of murder, this is not to say that, if to presence there is added proof of participation, he could not also be convicted under Ss. 34 and 302. Participation must depend on the facts, but it is not negatived merely because actual presence and prior abetment are proved.

Penal Code—If exhaustive of criminal law of India—Interpretation of Code —Principles of—Prior law—Alteration or enactment of—No assumption as to.

The criminal law of India is prescribed by and, so far as it goes, is contained in the Indian Penal Code; the criminal law of India and that of England accordingly differ in sundry respects; and the Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before. The Code must not also be assumed to have sought to introduce differences from the prior law.

Privy Council—Criminal case—Special leave to appeal in—Grant of—Conditions—Points not raised at the trial if will be considered.

Points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave.

When special leave to appeal to the Privy Council is asked for in criminal matters, the applicant has to show that the summing-up affected the due course of justice and the right of the prisoner to be fairly tried according to law within the strict and narrow limits laid down by their Lordships in such cases.

Letters Patent (Calcutta), cls. 25, 26, 41—Effect—High Court—Original criminal jurisdiction—Conviction by a Judge acting in exercise of—Certificate by Advocate-General under cl. 26—Dismissal of application based on, by Full

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Bench—Appeal to Privy Council from, under cl. 41—Right of—Special leave to appeal as an alternative—Grant of, in such a case.

The appellant was tried and convicted by a learned Judge of the High Court of Calcutta acting in the exercise of its original criminal jurisdiction. The learned Judge reserved no question of law; but the Advocate-General of Bengal granted a certificate under cl. 26 of the Letters Patent. The Full Bench of the High Court, after full consideration of the point raised by that certificate, dismissed appellant's application under cl. 26 aforesaid. On an appeal preferred by the appellant under cl. 41 of the Letters Patent from the High Court, *Quaere* whether an appeal under cl. 41 of the Letters Patent was competent

Their Lordships observed that they ought not to be understood as giving any encouragement to appeals in criminal matters under Art. 41 where no point of law had been raised by the Trial Judge, and that, in a case brought before the Board under Art. 41, the appellant ought not to assume that an application for special leave to appeal as an alternative would be granted or even entertained by their Lordships.

Privy Council—Criminal case—Special leave to appeal—Grounds for—Violation of natural justice—Trial for full offence instead of for attempt at or abetment of same if and when amounts to.

Although in general hardly anything could more conspicuously violate natural justice than to convict and sentence a man for an offence of which he was not guilty, it may be that irregularity alone is the proper term to use, when, the facts being the same, the evidence the same, the guilt the same, and the punishment the same, error has occurred in indicting him under the section which charges the full offence instead of under the sections which charge an attempt at or an abetting of the full offence, especially when this error could have been corrected in time, if the accused had put his counsel in a position to raise his defence clearly and in due form at the trial.

Appeal from a conviction for murder under S. 302 of the Indian Penal Code (Act XLV of 1860), and a sentence of death passed by Page, J. at the Criminal Sessions of the High Court of Judicature at Fort William, Bengal, on the 17th August, 1923.

The material facts and evidence appear from their Lordships' reasons for their report to His Majesty. The prisoner subsequent to his said conviction applied to the Advocate-General of Bengal, and was granted a certificate, under Art.26 of the Letters Patent of the 28th December, 1865, to the effect that the Trial Judge's charge to the Jury as follows :—

"The issue before you is this: Whether or not the prisoner in combination with two or more persons murdered Amrita Lal Roy, Postmaster of Sankaritolla Post Office. In this case, therefore, the issue before you is 'murder or no murder.' If you come to the conclusion that the accused himself was the person who fired the fatal shot, you will find him guilty. If you don't, I tell you as a matter of law if you find that the bullet fired by one of these three or four men caused the death of Amrita Lal Roy in furtherance of a common murderous intention, then I tell you that in law each of them is equally liable,

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and it does not matter one whit which of them fired the fatal shot. If you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied, on the other hand, that the shot was fired by one of these persons in furtherance of a common murderous intention, if that be so, then it is your duty to find a verdict of guilty"

contained certain directions and omissions amounting in law to a misdirection, which should be further considered by the High Court. Thereupon, a Full Bench (consisting of Sir Asutosh Mookerjee, Thomas Richardson, Ghose, Cuming and Page, JJ.) on the 5th, 6th, 7th, 10th and 11th September, 1923, considered and received the points thus referred, and on the 26th September, 1923, ordered "that the application made by the prisoner under Art. 26 of the Letters Patent do stand dismissed." [The proceedings are reported in *Emperor* v. *Barendra Kumar Ghose* (1).]. On the 3rd October, 1923, the prisoner presented a petition to the High Court, purporting to be under Art. 41 of the Letters Patent, alleging that "being aggrieved by the said dismissal of his application, and by the judgment and sentence passed upon him by Page, J." and, therefore, praying "for leave to appeal therefrom to His Majesty in Council." Upon this petition, the High Court (Mookerjee and Chatterjea, JJ.) on the 8th October, 1923, made an order declaring "that the case is a fit one for appeal to His Majesty in Council under Art. 41 of the Letters Patent of 1865."

At the hearing before the Board, objection was taken on behalf of the Crown that the appeal was incompetent and the appellant in consequence applied to the Board in the alternative for special leave to appeal.

L. de Gruyther, K. C. and *W. Wallach* for appellant.

A. M. Dunne, K. C. and *K. Brown* for respondent.

The Board decided that they would humbly advise His Majesty that the appeal should be dismissed, and that the application for special leave should not be granted, on the 23rd October, 1924, their considered reasons as under were delivered by

Lord Sumner.

LORD SUMNER :—This was an appeal from the High Court of Calcutta brought in a criminal matter under Art. 41 of the Letters Patent. The Trial Judge reserved no question of law and the case came to the High Court on

1. (1923) 81 I C 353.

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the certificate of the Advocate-General of Bengal under Art. 26. Objection was taken at their Lordships' bar to the competence of this appeal on the ground that Art. 41 does not give an appeal to their Lordships from the determination of the High Court, unless the case came before that Court at the instance of the Trial Judge. Thereupon the appellant applied in the alternative for special leave to appeal. The materials being the same in both proceedings though the questions arising are not identical, their Lordships were able to decide the appeal and the application together and, in view of the gravity and urgency of the case, they dispensed with a formal petition for special leave to appeal. After hearing the arguments, they announced last July the substance of the advice, which they would humbly tender to His Majesty, namely, that the appeal should be dismissed. At the same time their Lordships intimated that they were unable to advise that the application for special leave to appeal should be granted. Their reasons are as follows.

On 3rd August, 1923, the Sub-Postmaster at Sankaritolla Post Office was counting money at his table in the back room, when several men appeared at the door which leads into the room from a courtyard, and, when just inside the door, called on him to give up the money. Almost immediately afterwards they fired pistols at him. He was hit in two places, in one hand and near the armpit, and died almost at once. Without taking any money the assailants fled, separating as they ran. One man, though he fired his pistol several times, was pursued by a Post Office assistant and others with commendable tenacity and courage, and eventually was secured just after he had thrown it away. This man was the appellant ; the others escaped. The pistol was at once picked up and was produced at the trial.

There was evidence for the prosecution, such as the jury was entitled to act upon, that three men fired at the postmaster, of whom the appellant was one ; that he wore distinctive clothes by which he could be and was identified ; and that, while these men were just inside the room, another was visible from the room through the door standing close to the others but just outside on the doorstep in the courtyard. This man was armed but did not fire.

Except for a doubt as to the total number of the men concerned in the attack, most of the witnesses concurring in the

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above statement while ultimately the prisoner said they were only three in number, the evidence of the eye-witnesses was consistent and uniform. The pistol thrown away by the prisoner was a German automatic self-ejecting pistol. An ejected shell was found just inside the room near the door, and it fitted this pistol. The bullet which killed the postmaster was cut out of his back and was produced, and it also fitted the ejected shell and the pistol carried by the prisoner. This bullet was distinctively of German make. It was not however conclusively proved that no other assailant had a similar pistol to that which the prisoner had or used a similar bullet to that found in the deceased.

The appellant was defended by five counsel. A few of the witnesses were cross-examined by them but very sparingly, and only to test their adherence to their evidence given in chief. Most of them were not cross-examined at all. No affirmative defence was indicated in any part of this cross-examination and no witnesses were called on the part of the prisoner, but after the case for the prosecution was closed the prisoner made an oral statement, which of course was not on oath and was not cross-examined to. Here for the first time some foundation was laid, though vaguely, for what eventually became the case raised on this appeal.

According to the prisoner, he was the man outside the room. He said that he stood in the courtyard and was very much frightened. The prosecution had left his purpose to be inferred from his position and his action. Whether he was present as one of the firing party or as its commander or as its reserve or its sentinel was of no special importance on the case made for the Crown. What was singular was the prisoner's own reticence on these matters. He dealt with none of them. Why he was there at all and why he did not take himself off again he did not say, nor did he even indicate his precise position in the yard. Accordingly the evidence called by the prosecution, that the man outside was close to the men inside and, being visible by those within, would also see what went on within, was never challenged at all. The appellant's account was : "I took my stand on the portico"—this ran round two sides of the courtyard and according to the plan is consistent with a position on the steps of the doorway.

"After a minute I heard two sounds, *dum, dum* ; when I heard the sounds I was confused. I perspired heavily and could not remember anything. Afterwards I heard *chor chor* ; not finding the others there, I ran away."

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Finally he said (and it was to this that the only affirmative part of his counsel's cross-examination was directed)—

"I have never assaulted any one in my life. This is my first offence. I throw myself on the mercy of the Court. I was married hardly three months ago."

The charges preferred were murder under S. 302 of the Indian Penal Code, and voluntarily causing hurt under S. 394, while jointly concerned in an attempted robbery. To the first charge he pleaded not guilty. To the second he pleaded guilty of robbery. Their Lordships do not pause to remark on the inconsistency of this latter plea with the argument subsequently advanced in the High Court. There were further charges of attempted murder and attempt to commit culpable homicide, which were abandoned by the prosecution at the outset.

The learned trial Judge, Page, J., directed the jury carefully, upon the footing, that the prisoner was one of the men inside the room, that he was one of those who fired, and might be the man who fired the fatal shot, and that in any event, if they were satisfied in terms of S. 34 of the Code, that the postmaster was killed in furtherance of the common intent of all, then the prisoner was guilty of murder, whether he fired the fatal shot or no. He did not deal with the prisoner's statement until the prosecuting counsel reminded him of it, when he told the jury that its weight was for them, but it formed part of the evidence which they had to consider. He gave no express direction on the subject either of attempted murder or of abetting murder. It appears to their Lordships that, as the whole summing up was rested, in sentences more than once repeated, upon the prisoner being one of those inside the room and on his firing at the postmaster, the direction to the jury to take his statement into account might well be understood as impliedly instructing them to acquit, if they believed his whole statement as to his action and his connection with the murder to be true, since in that case the conditions would not be fulfilled on which throughout the summing-up it was stated that the guilt of the accused must rest. This view, however, was not put forward in the Court below, and their Lordships are quite satisfied to deal with the matter as it was presented to the High Court upon the question of misdirection.

The note of the defence submitted, which was taken by the trial Judge is as follows : " No evidence of murder, because

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no evidence that prisoner killed him." This he overruled, saying quite rightly "there is evidence that accused fired the fatal shot." If the defence subsequently raised before the High Court had been put before him intelligibly, it should have been a submission that the jury ought to acquit if they thought that the accused either fired and missed or did not fire at all, and that they must not find that he fired the fatal shot without weighing the fact that the prosecution had not actually proved that neither of the other men fired from a German automatic pistol like the prisoner's, though there was evidence making it improbable that they were armed as he was. As to the subsequent defence resting on abetment, it does not appear to have been thought of at all. It would be a circumstance proper to be considered on the application for special leave, that, neither in cross-examination nor in argument before the verdict was found, was any point about abetment taken, nor was even any point as to an attempt clearly urged. It was not too late to have amended the charge and to have given further directions to the jury (Criminal Procedure Code, S. 227) and points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave. In the present case, however, their Lordships think it unnecessary to dwell further on this matter.

In the period of over sixty years which have elapsed since the Indian Penal Code came into force, a very large number of cases have of course been reported, in which joint commission of crime, attempts to commit crime, and abetments of crime, in many and very various forms, have been the subject of judicial rulings. With insignificant exceptions the Code has been interpreted in all the Indian Courts down to a few years ago in conformity with the English law existing in 1860.

The learned Judges in the High Court examined the authorities so fully and exhaustively that it would serve no good purpose if their Lordships were to discuss them again *seriatim*. The chief authority for the appellant is a decision of Stephen, J., in 1914 in *Emperor* v. *Nirmal Kanta Roy* (2), a case in which two men, obviously acting in concert, having both fired at a policeman, one hitting and killing him and the other failing to hit him at all, that learned Judge directed the acquittal of the latter, who was charged under Ss. 302/34

2. (1914) I L R 41 C 1072.

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with murder. He held that, applying S. 34 to the case, the criminal act was the killing of the policeman : that only one man killed him, not both : that all the prisoner did was to try to kill him, and that the criminal act charged was not done by several persons at all, that is to say *was not under the circumstances a joint act,* and he added "the only act he can be liable for under the section is one done by several persons, of whom he was one, that is by the man who escaped and himself . . . In order to make the accused liable for murder under S. 34 it would be necessary to say that an offence and an attempt to commit it are the same 'act,' which seems to me not to be the case." This view of the meaning of S. 34 was adopted in *Emperor* v. *Profulla Kumar Mazumdar* (3) the High Court observing that "S. 34 does not create an offence— the provisions thereof merely lay down a rule of law." Reference may also be made to ***Emperor*** v. ***Chandan Singh*** (4) and Punjab Record Criminal Rulings, Nos. 21 and 24.

Before 1914 there seems to have been no case in Bengal in which the view of S. 34 formulated by Stephen, J., in *Nirmal's case* (2) was adopted by any Judge, while the cases to the contrary are numerous. It is evident that till then the view now contended for had a very small place in the voluminous body of criminal decisions, and it has since been as often criticised as followed, and more often than not has been disregarded altogether. This is so in all the Courts in India. The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result, is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class, unless the words of the Code clearly negative it. Of course questions arise in such cases as to the extent to which the common intention and the common contemplation of the gravest consequences may have gone, and participation in a joint crime, as distinguished from mere presence at the scene of its commission, is often a matter not easy to decide in complex states of fact, but the rule is one that has

2. (1914) I L R 41 C 1072. 3. (1923) I L R 50 C 41.
4. (1917) I L R 40 A 103.

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never left the Indian Courts in much doubt. As illustrations of the course of decision, reference may be made to the cases of *Jan Mahomed* (5), *Mahabir* (6), *Keshwar Lal Shaha* (7), *Gouridas Namasudra* (8), *Kanhai* (9) and *Manindra Chandra Ghose* (10).

The appellant's argument is, in brief, that in S. 34 "a criminal act," in so far as murder is concerned, means an act which takes life criminally within S. 302, because the section concludes by saying "is liable for that act in the same manner as if the act were done by himself alone," and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim. Thus the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done, as if he had done it by himself. Such a proposition was not worth enacting, for, if a man has done something criminal in itself, he must be punishable for it, and none the less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common to all. It follows from the appellant's argument that the section only applies to cases where several persons (acting in furtherance of a common intention) do some fatal act, which one could do by himself. Criminal action, which takes the form of acts by several persons, in their united effect producing one result, must then be caught under some other section and, except in the case of unlawful assembly, is caught under attempts or abetment. By way of illustration it may be noted that, in effect, this means, that, if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is not a murderer and, each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the evidence inclines in favour of the marksmanship of two or of one.

This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough : there must be proved an act, which kills, done by several persons and corresponding to,

5. (1864) 1 W R Cr R 49.
6. (1899) I L R 21 A 263.
7. (1902) I L R 29 C 496.
8. (1908) I L R 36 C 659.
9. (1912) I L R 35 A 329.
10. (1914) I L R 41 C 754.

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if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several persons cannot do the same act as one of them does. They may do acts identically similar, but the act of each is his own, and because it is his own and is relative to himself, it is not the act of another or the same as that other's act. The result is that S. 34, construed thus, has no content and is useless. Before the High Court the appellant's Counsel put an illustration of their own, which may be taken now, because, the whole range of feasible illustrations being extraordinarily small, this one is equally exact in theory and paradoxical in practice. Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under S. 34. Really it is not. Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up, and exerting himself in the way that is natural to him, in a word in a way that is his. Let it be that in effect each pulls as hard as the other and at the same time and that both equally contribute to the result. Still the act, for which either would be liable, if done by himself alone, is precisely not the act done by the other person. There are two acts, for which both actors ought to suffer death, separately done by two persons but identically similar. Let us add the element, that neither act without the other would have been fatal ; so that the fatal effect was the cumulative result of the acts of both. Even this does not make either person do what the other person does : it merely makes the act, for which he would be liable if done by himself alone, an attempt to murder and not an act of murder, and accordingly the case is not an illustration of S. 34. To this the reply was made before the High Court, that, in a case where death results from the cumulative effect of different acts, each actor must be deemed guilty of murder, though whether because it cannot be shown that it was not his act alone which took the victim's life, or because the absurdity of the argument had to be disclaimed somehow, it is not easy to determine. Yet absurd it is, and absurd it must remain. "Where two men have done a man to death," said the learned counsel (Record 127), "your Lordships will not inquire into the individual effect of each blow : but the point I am insisting on is that the doing to death must have been the joint acts of

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both." This concession, rational enough in itself, is another way of saying that the section really means "when a joint criminal act has been done by the acts of two persons in furtherance of a common intention, each is liable for that joint criminal act, as if he had done it all by himself." On the other hand, if it is read as the appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made liable for his act only and as if he had done it by himself, each can say that the prosecution has not discharged the onus, for no more is proved against him than an attempt, which might not have succeeded in the absence of the other party charged. Thus both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man. If, on the other hand, each were tried separately by different juries, either jury or both, taking the view that the violence used by the man before them killed the man, whom they knew to be dead, might return unimpeachable verdicts of murder, and then both men would be justly hanged.

As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that the words of S. 34 are not to be eviscerated by reading them in this exceedingly limited sense. By S. 33 a criminal act in S. 34 includes a series of acts and, further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S. 37, when any offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait". By S. 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar or diverse, by several persons, if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to

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it. S. 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.

The other part of the appellant's argument rests on Ss. 114 and 149, and it is said that, if S. 34 bears the meaning adopted by the High Court, these sections are otiose. S. 149, however, is certainly not otiose, for in any case it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, *viz.*, one of those named in S. 141 [*R.* v. *Sabed Ali* (11)], and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of S. 34, is replaced in S. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but S. 149 cannot at any rate relegate S. 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all.

As to S. 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition ; [*Abhi Misser* v. *Lachmi Narain* (12)]. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. S. 114 deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and

11. (1873) 11 Beng L R 347 at 359. 12. (1900) I L R 27 C 566.

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the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence *plus* prior abetment can mean nothing else but participation. The presumption raised by S. 114 brings the case within the ambit of S. 34.

The prosecution gave no evidence of any prior connection of the accused with the crime, but began the case at the time when the assailants appeared at the post office. The discovery of sundry pistols and daggers among the appellant's effects, some hours after the crime, was proved but not that they were those used in the commission of the murder. There was nothing in the prosecution's case to show that he had instigated or aided the commission of the crime before the actual commission began. The evidence on this matter was wholly supplied by the prisoner himself. His statement was that earlier in the day, when he was reclining on his couch after a meal, " one, whom he knew to be a God-fearing man and a man of learning, " came and took him to a house, where he found two young men. Here he was solicited to go with them in order to commit a dacoity, and when he reluctantly consented and was shown how to use the pistol with which, like the others, he was then supplied, he stipulated that he was not to be a party to any dacoity or murder and was told there was to be no murder and he was to be there merely for show. It is plain from his statement that these persons had some hold over him, for when, by way of excusing himself, he had said, " My brother is in Government service and draws large pay. The money I earn is enough for me, " he states that the other man " looked at me for a time. I could not speak " ; and when he had been told that he was to be there only for show, he adds, " I was not in a position to speak. I went with them. " Thus his statement goes at most to abetting a dacoity, the crime to the actual commission of which he pleaded guilty, but, as he had stipulated with success that there was to be no murder, it is not itself a statement showing an abetment of murder. Strictly, therefore, there was no evidence of any such abetment as has to be proved before

S. 114 comes into operation. As to the appellant's presence at the post office, it has been already pointed out that he gave no explanation of it at all, but his story was much more consistent with participation in the actual commission of the crime than with mere bodily presence after previous abetment. Indeed, he says that, when he ran away, the others had already disappeared ; thus it would seem that he covered their retreat. At any rate, his statement supports presence by way of actual participation in the criminal act or series of acts by which the postmaster was killed rather than such conduct as adds to previous abetment, bodily presence at the commission of the crime abetted and nothing more and S. 114 was never really made applicable for want of proof of abetment of the very crime, at the commission of which the appellant was actually present.

For these reasons their Lordships think that only the most unsubstantial foundation was laid for any discussion of S. 114 at all, but, as it was fully considered by the High Court, they state their own concurrence in the conclusion of the learned Judges below. Even if it be the case that the accused could have been convicted as an abettor, present at the commission of the offence, this is not to say that, if to presence there is added proof of participation, he could not also be convicted under Ss. 34 and 302. Participation must depend on the facts, but it is not negatived merely because actual presence and prior abetment are proved.

Their Lordships do not think it useful to go at length into the history of the preparation and enactment of the provisions of the Indian Penal Code, which played no inconsiderable part in the discussion of this subject in India. That the criminal law of India is prescribed by and, so far as it goes, is contained in the Indian Penal Code ; that accordingly (as the Code itself shows) the criminal law of India and that of England differ in sundry respects ; and that the Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before, are, though common-places, considerations which it is important never to forget. It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the

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case of abetment. It abandons others, such as principal in the first or the second degree, but it must not be supposed that, because it ceases to use the terms, it does not intend to provide for the ideas which those terms, however imperfectly, expressed. One object which those who framed the Code had in view, was to simplify the law ; and to get rid of the terms "principal in the first degree" and "principal in the second degree" and others was no doubt a step in that direction, but to introduce a general section, S. 34, which has little, if any, content, and to attach a wholly new importance to abetments and attempts, was to complicate, not to simplify, the administration of the law, for participation and joint action in the actual commission of crime are, in substance, matters which stand in antithesis to abetments or attempts. If S. 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether. If the appellant's argument were to be adopted, the Code, during its early years, before the words "in furtherance of the common intention of all" were added to S. 34, really enacted that each person is liable criminally for what he does himself, as if he had done it by himself, even though others did something at the same time as he did. This actually negatives participation altogether and the amendment was needless, for the original words expressed all that the appellant contends that the amended section expresses. One joint transaction by several is merely resolved into separate several actions, and the actor in each answers for himself, no less and no more than if the other actors had not been there. This got rid of questions about principals in the first or the second degree by ignoring them, and the object of the framers of the Code was attained. In truth, however, the amending words introduced, as an essential part of the section, the element of a common intention prescribing the condition, under which each might be criminally liable when there are several actors. Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amended section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether repugnant to the

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suggested view of the original section. Really the amendment is an amendment, in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words, " a criminal act " means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.

Their Lordships are accordingly of opinion that the Full Bench of the High Court rightly construed S. 34 of the Indian Penal Code, and that the view taken of it in *Nirmal Kanta Roy's case*(2) is not correct. This disposes of the main question raised in the appeal and in the application for special leave. Assuming that Page, J., in taking the view of S. 34 which he did take, directed the jury correctly on the subject, there is admittedly little left in the general objections to his summing-up. It was very fully examined by the Full Bench of the High Court, and the learned Judges were unanimously of opinion that it did not call for any review. Their Lordships do not think it necessary to re-examine it sentence by sentence, or to reiterate the reasons which the learned Judges gave for their conclusion. It is enough to say that, having fully considered the summing-up themselves, they entirely concur in the conclusion of the Full Bench. The learned Judge's direction was not erroneous in point of law, and it sufficiently dealt with the material facts. It therefore contained no misdirection: still less was it such a summing-up as affected the due course of justice and the right of the prisoner to be fairly tried according to law within the strict and narrow limits, which have long been laid down by their Lordships' Board when special leave to appeal is asked for in criminal matters.

The argument against the competence of the appeal was substantially as follows. Subject to the satisfaction of the conditions which Art. 41 contains, the appeal is a limited appeal as of right, and must, therefore, be strictly construed. It is given in two cases only, and beyond those cases any appeal is incompetent. The two cases are these: first, that the High Court in the exercise of its original criminal jurisdiction, has passed a judgment, order or sentence; and, second, that there

2. (1914) I L R 41 C 1072.

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has been a criminal case where the Court, exercising original jurisdiction in that case, has itself reserved a point or points of law for the opinion of the High Court. The present case does not fall within the words "from any judgment, order or sentence of the said High Court of Judicature..... made in the exercise of original criminal jurisdiction" but it must be brought within the second alternative. Now, the Advocate-General of Bengal, under Art. 26 of the Letters Patent, granted his certificate that in his judgment "whether the alleged direction or the alleged omission to direct the jury do not in law amount to a misdirection should be further considered by the said High Court." After full consideration of the question so raised, the Full Bench of the High Court made its order in the following terms : "The order of the Court is that the application made by the prisoner under cl. 26 of the Letters Patent do stand dismissed"; and this is the order by which the appellant is really aggrieved. It is true that in his petition to the High Court for a declaration of the fitness of his case for further review, he says "that, being aggrieved by the said dismissal of his application and by the judgment and sentence passed and pronounced upon him by the Hon'ble Mr. Justice Page, your petitioner prays for leave to appeal therefrom to the King's Most Excellent Majesty in Council"; but this statement is doubly inexact. The High Court does not and does not purport to grant leave to appeal: it grants or withholds a declaration of its opinion on the fitness of the case for appeal. Further, the appeal is from the order of the High Court itself refusing to exercise its power to interfere with the trial and sentence. If it had discharged the sentence and directed an acquittal to be entered, the appellant would not have been aggrieved by the judgment and sentence of Page, J., at all. If it had altered the sentence, his grievance would have been that the alteration did not go far enough. The complaint is that the High Court dismissed the application, and this is the order from which he claims to appeal. Accordingly his application is made in a case which does not fall within the words "in any criminal case where any point or points of law have been reserved for the opinion of the High Court in manner hereinbefore provided by any Court which has exercised original jurisdiction"; for the points of law were not reserved by the Court which exercised original jurisdiction, nor did the Court exercise its discretion in the matter in terms of

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Art. 25. That article provides that, but for the case therein excepted, "there shall be no appeal to the High Court from any sentence passed in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the High Court," and although Art. 26, which states what is to be done with these points reserved, introduces a new reserving authority, the determination of the High Court on the question reserved is final, except only for the express provision of Art. 41. It says :—

"And we do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that in his judgment..........a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case........and finally determine such point or points of law.........."

Now, Art. 41 names, as part of the defining limits of the right to appeal to His Majesty in Council, a reservation of points of law by a Court exercising original jurisdiction, which is not the reservation made in this case, and the fact that a reservation by the Advocate-General is mentioned and provided for in S. 26, and is omitted from S. 41, makes the intention clear. When an authority outside the High Court is empowered to bring about a right of first appeal by a certificate of his own, that appeal is to the High Court and is finally concluded by its determination. There is no second appeal. When the reservation originates within the High Court itself, then, subject to the approval of the High Court to the fitness of the case in that regard, a second appeal is competent. With Art. 41 the Advocate-General has nothing to do. The proceedings of the two tribunals, the High Court exercising original criminal jurisdiction and the High Court determining by its judgment points reserved for its consideration, are strictly two proceedings, and, when the trial Judge is *functus officio* and the whole matter has passed to the Court in review, the conditions under which the further decision in review can be brought before His Majesty in Council under Art. 41 are strictly limited to those which that section prescribes for that very case. Such was the submission on behalf of the respondent, and there can be no doubt that it was a weighty one.

Having arrived at the above-stated conclusion on the construction of the Code, which goes to the root both of the appeal and the application for special leave, their Lordships

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do not, however, think it necessary to proceed with the question whether in this case an appeal under Art. 41 of the Letters Patent is competent. In 1901 an appeal (*Subramania Aiyar v. King-Emperor* (12)) was heard and determined by their Lordships' Board, in which the decision under review was that of the High Court at Madras in a criminal matter, brought before it on the certificate of the Advocate-General under Art. 26. The terms of the Letters Patent of the High Courts of Calcutta and Madras are for the present purpose identical. No objection was taken by counsel that under these circumstances an appeal to their Lordships' Board under Art. 41 was incompetent, nor is any question raised on this point in the judgment of the Board, and the explanation of this circumstance probably lies in the fact, that, in addition to the appeal under Art. 41, special leave to appeal had been applied for and had been granted by Her Majesty in Council on 29th June, 1900. The decision in that case does not therefore conclude this matter, but their Lordships think it inexpedient to deal with the objection now, since on the other grounds above stated the appeal itself in their opinion must fail. They desire, however, to say that they must not be understood as giving any encouragement to appeals in criminal matters under Art. 41, where no point of law has been raised by the trial Judge, nor are appellants, who have chosen this mode of bringing their case before the Board, to assume that an application for special leave to appeal as an alternative will be granted or even entertained by their Lordships.

For similar reasons they do not deal with other considerations relating to the grant of special leave to appeal to His Majesty such as the following. Although in general hardly anything could more conspicuously violate natural justice than to convict and sentence a man for an offence of which he was not guilty, it may be that irregularity alone is the proper term to use, when, the facts being the same, the evidence the same, the guilt the same, and the punishment the same, error has occurred in indicting him under the section which charges the full offence instead of under the sections which charge an attempt at or an abetting of the full offence, especially when this error could have been corrected in time, if the accused had put his counsel in a posi-

12. (1901) I L R 25 M 61 : 11 M L J 233 (P C).

tion to raise his defence clearly and in due form at the trial. Upon this point also their Lordships express no opinion at present.

Solicitors for appellant : *T. L. Wilson and Co.*

Solicitor for respondent : *Solicitor to the India Office.*

A. de M. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Mangamma Nayakuralu ... *Appellant** (*1st defendant—1st respondent*)

v.

B. M. Ramadasappa Nayanimvary and others ... *Respondents* (*Respondents 2 to 5—L. Rs. of 2nd and 3rd petitioners*).

Mangamma Nayakuralu v. Ramadasappa Nayanimvary.

Limitation Act, Arts. 181, 182—*Applicability—Decree modified on appeal by exempting certain property from liability under decree—Execution levied against exempted property pending appeal—Refund of amount realised by, pursuant to appellate decree—Subsequent application for execution by decree-holder against property held liable by appellate decree—Limitation—Starting point.*

The appellant was the judgment-debtor, the wife of a Zamindar, against whom a suit had been filed which resulted in a decree on 10th April, 1911, subsequently confirmed on appeal to the Lower Appellate Court on 28th March, 1912. On a second appeal from the decree of the Lower Appellate Court, the High Court by its decree, dated 23rd April, 1914, modified the decree of the Lower Appellate Court by adding the words "excluding the Zamindari."

Subsequent to the decree of the Lower Appellate Court and pending the second appeal, the decree-holder applied on 15th August, 1912, for execution and attempted to attach the Zamindari properties. Thereupon the appellant raised funds and satisfied the decree on 14th July, 1913, and the execution petition was dismissed. After the decree of the High Court the appellant applied for refund of the amount paid by her in 1913 in satisfaction of the decree on the ground that it was realised by the decree-holders by proceeding against the Zamindari properties which were not liable under the modified decree of the High Court. The order of refund was passed on 30th March, 1918, and on 1st November, 1918, the appellant got a refund of the whole of the amount paid by her.

On 22nd April, 1920, the decree-holders presented an application for execution against the assets of the appellant's husband ; and the question arose whether it was in time.

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*A A A O No. 89 of 1923. 18th December, 1924.

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Held, that the application was governed by Art. 181 of the Limitation Act, that the right to apply accrued in 1918 on the date when the judgment-creditor was ordered by the Court to refund the money by way of restitution to the judgment-debtor, and that the application was therefore not barred.

Per Odgers, J. :—The application of 22nd April, 1920, may be treated as a continuation of the prior application, and, so treated, would be well within time.

Per Wallace, J. :—*Quaere* :—Whether the application of 22nd April, 1920, could be treated as a continuation of the prior application.

Semble :—If so treated, it would be governed by Art. 181, and would not be barred.

Appeal against the Appellate Order of the District Court of Chittoor in A. S. No. 318 of 1921 preferred against the order of the Court of the Subordinate Judge of Chittoor in E. P. No. 31 of 1920 in O. S. No. 6 of 1911.

K. Bhashyam Aiyangar for appellant.

A. Ramachandra Aiyar for respondents.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This is an appeal giving rise to a somewhat important point of limitation, and the dates are important. The appellant is the judgment-debtor, the wife of a certain Zamindar, against whom a suit was filed which resulted in a decree on the 10th April, 1911, subsequently confirmed on appeal to Lower Appellate Court on 28th March, 1912. The decree-holder applied on 15th August, 1912, for execution and attempted to attach the Zamindari properties. Thereupon the defendant raised funds and satisfied the decree on 14th July, 1913, and the execution petition was dismissed. An appeal from the decree of the Lower Appellate Court, dated 28th March, 1912, was preferred to the High Court which, by its decree, dated 23rd April, 1914, introduced a modification which has given rise to the question at issue as in the second appeal the High Court modified the decree by adding the words "excluding the Zamindari." After the High Court decree the 1st defendant filed I. A. No. 19 of 1916 for refund of the amount paid in 1913 in satisfaction of the decree on the ground that it was realized by the decree-holders by proceeding against Zamindari properties which were not liable under the modified decree of the High Court. The order of refund was passed on 30th March, 1918, and on 1st November, 1918, the appellant got back the amount she paid in satisfaction of the decree, *i. e.*, the whole amount was refunded. On 22nd April, 1920, the decree-holders presented the present application for execution

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against the assets of the 1st defendant's husband ; and the question is, is this application in time ? Both the Lower Courts have held it is.

We have been referred to a number of cases on the subject which may be said to fall into two main categories :— (1) The class of case which regards a subsequent proceeding in execution as a continuation of a prior one—a doctrine apparently introduced in order to obviate the provisions of the Limitation Act of 1877, S. 15, which could not be applied to applications but was only applicable to suits ; and (2) the other class of case recognises that Art. 182 of the present Limitation Act is not exclusively to be applied to execution applications but there may be certain instances in which it would be right and proper to apply Art. 181. The effect of this class of cases would be to give a fresh starting point from the time when the right to apply accrues. Another possibility is suggested by the learned vakil for the appellant, namely, that the time during which the decree-holders were prosecuting their original execution application should be excluded from computation. I can, however, find no authority for this unless it can be construed as part of what may be called the continuation theory. A quite possible view is that down to 1918 the decree was in fact non-executable by the decree-holders as they had been paid in full. I am in favour of regarding 1918 as a fresh starting point of limitation by the application of Art. 181. That Art. 181 can be applied to execution matter was established in *Rungiah Goundan and Co.* v. *Nanjappa Rao* (1), which held that Art. 179, *i. e.*, Art. 182 is not exhaustive of applications for execution of decrees and that it is not the law that Art. 178 (*i. e.*, Art. 181) cannot be applied to any application for execution of any decree. See also the Privy Council case in *Rameshwar Singh* v. *Homeshwar Singh* (2), where their Lordships applied Art. 181 holding that Art. 182 did not apply inasmuch as the decree in question was not under certain circumstances capable of being enforced. A very similar case to the present is the case referred to by the learned District Judge, *Ramineedi Venkata Appa Rao* v. *Lakkoju Chinna Ayyanna* (3). There the sale in execution was set aside, and the decree-holder was ordered to refund and it was held that on the decree-holder

1. (1903) I L R 26 M 780 (P. C.). 2. (1920) 40 M L J 1 (P C)
3. (1906) I L R 30 M 209.

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subsequently applying to execute his decree such application is governed by Art. 178, *i. e.,* Art. 181, when time began to run against him from the date when he is ordered to refund the purchase money when alone his right to apply accrued. The Court there was obviously pressed by the difficulty of avoiding Art. 179, *i. e.,* Art. 182, but they were equally pressed by the injustice that would accrue if the opposite view were taken. Two older authorities can be cited, one in *Issurree Dassee* v. *Abdul Khalak* (4) which is an example of what may be called the continuation theory. There the former execution proceedings were struck off the file. Subsequently a refund was ordered, and the plaintiff 18 or 19 months after applied to execute his decree. The High Court held that under the circumstances the application should be considered as an application to continue the old proceedings. Similarly in *Kalyanbai Dipchand* v. *Ghanasham Lal Judanathji* (5) the learned Judges were pressed by the fact that S. 15 of the Limitation Act of 1877 was in terms applicable to applications. They held that if Art. 179 applied "the most monstrous injustice would ensue," and construed the application as an application to continue the former proceedings.

An objection has been advanced to regarding the present case as a continuation from the fact that a different property, *i. e.,* non-Zamindari property, is now to be proceeded against, whereas the decree was admittedly previously satisfied from the Zamindari property. The answer to that objection appears to me to be twofold, namely, that this is the first application to execute the High Court decree as such, and therefore the decree-holders are perfectly justified in proceeding against any property of the appellant which is non-Zamindari property; and secondly, it has been held in *Gnanendra Kumar Rai Chowdhri* v. *Rishendra Kumar Rai Chowdhry* (6) that the filing of a supplementary list of properties may be taken as part of the original application and that the decree-holders need not be confined to the properties they had originally specified. See also the remarks of Seshagiri Aiyar, J., in *Rajah of Karvetnagar* v. *Venkata Reddi* (7) "the fact that the decree-holder moved the Court only for a particular remedy open to him cannot lead to the inference that he was not

4. (1878) I L R 4 C 415. 5. (1880) I L R 5 B 29.
6. (1918) 22 C W N 540 7. (1915) I L R 39 M 570 at 573 : 29 M L J 96.

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entitled to ask that his decree be satisfied by other means which the law enables him to adopt." Also in *Mohini Mohan Sircar* v. *Navadip Chandra Biswas* (8), a decision of the Calcutta High Court, it was held that when on an application for execution made in accordance with law execution cannot be successfully taken against the property specified by reason of causes for which the decree-holder is in no way responsible he should not be confined to the properties first specified and it is open to him to ask the Court to proceed against other properties specified in his supplementary list. There the first application proved ineffective against the moveables of the judgment-debtor as the result of proceedings taken by the latter. His subsequent application was to attach the immoveables. Here in the present case the payment in discharge of the original execution petition was of course made by the judgment-debtor, and I think it would be unfair to hold that this must be held to be a matter for which the decree-holder is responsible. Further his prior execution proceedings proved ineffectual owing to the modification of the decree by the High Court which is certainly outside the control of the decree-holder. Several other authorities were cited to us. But I do not think it necessary to review them all. I think the case may fall under either of the theories that I have set out above. But it seems to me that some of the cases have proved to an extreme length on what I have called the continuation or revival theory, and speaking for myself I think it more satisfactory to rest the case on the application of Art. 181 of the Limitation Act. It is clear that in either case the application is within time. In my opinion, therefore, this second appeal must be dismissed with costs.

Wallace, J.

Wallace, J. :—I agree with my learned brother's proposed order, but would like to add my own view of this case. I think the principle to be applied is the general principle that a decree or an application for execution which cannot be executed cannot be time-barred. This principle has with respect to questions of limitation under S. 48 of the Civil Procedure Code been applied in a Full Bench case of this Court in *Aiyasamier* v. *Venkatachala Mudali* (9). It is true that a later Privy Council case which is very briefly stated contains no reasons and which is not reported in the authorised rulings.

8. (1918) 47 I C 911.

9. (1916) I L R 40 M 989 (F B).

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But in *Kulna Loan Co.* v. *Jnanendra Nath Bose* (10) seems in conflict with the view taken by the majority of the Full Bench. *Narhar Raghunath* v. *Krishnaji Govind* (11) is another case in point on this portion of the discussion.

But coming to the application of the principle to Art. 182 of the Indian Limitation Act, there is a Privy Council case in *Rameshwar Singh* v. *Homeshwar Singh* (2), a later decision than the *Kulna Loan Co.* v. *Jnanendra Nath Bose* (10) in which the principle was enunciated that Art. 182 does not apply to an execution petition when the decree was not at the time capable of being enforced. The decree in that case only became enforceable in a certain contingency which might or might not have happened. It did happen and the Privy Council held that limitation began to run, not from the date of the decree which would make Art. 182 applicable, but from the date of the happening of the contingency which made the decree executable, and that Art. 181 applied. The principle is enunciated there in wider terms than previously. It had been held in several cases that the immediate non-executability of a decree must be inherent in the decree itself, that is, that the mere reading of the decree would show that it was unexecutable at once. But the decree in *Rameshwar Singh* v. *Homeshwar Singh* (2) did not on the face of it imply any such non-executability since, for all that the Court passing the decree knew, the judgment-debtor might be already in possession of Janeshwar's property, and therefore the decree would be enforceable as soon as passed. The general principle laid down by the Privy Council is that, in order to make a provision of the Limitation Act, namely, Art. 182, apply, the decree sought to be enforced must have been in such a form as to render it capable "in the circumstances" of being enforced. I would stress the words "in the circumstances" as implying that the Court is to be guided by the circumstances of the case in deciding whether the decree could or could not have been enforced at once, that is, whether any right to execute it had or had not accrued. Part of the circumstance which their Lordships considered relevant in that case was whether or not the decree-holder was responsible for the delay which had taken place in giving effect to his title, that is, his right to execute.

2. (1920) 40 M L J 1 (P C) 10. (1917) 22 C W N 145 (P C).
11. (1912) I L R 36 B 368.

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Now when the decree-holder in the present case got his final decree as amended by the High Court, the decree he had obtained in the Lower Appellate Court was already satisfied and would remain satisfied unless the judgment-debtor chose to recover by appropriate proceeding the amount already paid. In my view the decree-holder could not, at least until the judgment-debtor demanded restitution, apply for execution of the amended decree. Until then it was not a decree capable of execution and Art. 182 would have no application. Art. 181 must therefore apply. On what date then did the right to execute accrue " in the circumstances " and is the delay in filing the execution petition due to any laches or default on the decree-holder's part? It might fairly be contended that the decree-holder's right accrued the moment that he was aware that the judgment-debtor was demanding restitution. The decree-holder was then in that view bound to hand over the amount obtained, and, as the High Court had finally determined, improperly obtained, in satisfaction of the decree finally amended, as he had no legal right to retain that amount any longer. His right to execute the amended decree would therefore accrue from the date on which he ought to have handed over the sum improperly obtained, just as if the restitution was due to a stranger whose money he had wrongfully acquired by improper execution proceedings against him.

Analogous cases are cases in which a decree-holder who has sued to remove an obstruction which barred the execution of the decree has failed to remove that obstruction. It has been held that the period during which he was pursuing that infructuous proceeding would not be excused in his favour. [See *Shivram Chintaman* v. *Sarasvatibai* (12) and *Khair-un-nissa* v. *Gauri Shankar* (13)]. The case in *Sunder Lal* v. *Banarsi Das* (14) bears some resemblance to the present, but it does not appear from the facts whether the decree-holder's final execution petition of 13th February, 1916 was within three years of the decision in favour of the judgment-debtors under the decree which had been attached and therefore within three years of the time when the right to have refunded the money arose. The case in *Ramineedi Venkata Appa Rao* v. *Lakkoju Chinna Ayyanna* (3) is almost on all fours with the present and there it was held that where an execution sale is set

3. (1906) I L R 30 M 209.
12. (1894) I L R 20 B 175.
13. (1881) I L R 3 A 484
14 (1918) 45 I C 531.

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aside at the instance of the judgment-debtor and the decree-holder has to refund the money to the judgment-debtor time begins to run against the judgment-creditor not from the date of the demand by the auction-purchaser but from the date when the decree-holder is first compelled by order of Court to refund the money to auction-purchaser. Following this decision I think I must hold in this case in agreement with my learned brother that the right to apply accrued on the date when the judgment-creditor was ordered by the Court to refund the money by way of restitution to the judgment-debtor.

I should just like to say a word or two on the argument put forward at some length before us that the execution petition should be treated as a revival or a continuation of the execution petition under the decree before amendment, which, being satisfied, was dismissed. It seems to me difficult to apply such a principle to the present case. From the mass of case-law, not always very consistent, which has grown upon this subject, I think the following general principles emerge: Firstly, Art. 182 assumes that the decree is capable of immediate execution and does not apply if it is not in such a case Art. 181 applies; Art. 182 is not exhaustive; [see *Chhedi* v *Lalu* (15) and *Rangiah Goundan and Co.* v. *Nanjappa Rao* (1)]; and where a decree is immediately capable of execution an execution petition *prima facie* after time may be treated as a revival or continuation of a previous execution petition when the decree-holder has in fact been diligent and put in such a petition. Secondly, such an execution petition or application may be treated as a continuation or revival of the former application closed or even dismissed; but if the decree-holder has not been diligent [see *Langtu Pande* v. *Baijnath Saran Pande* (16)] or if he has sought to be rid of an obstruction in execution and failed [see *Khair-un-nissa* v. *Gauri Shanker* (13) and *Shivram Chintaman* v. *Sarasvatibai* (12)] or if he does not seek for the same relief as in the previous execution petition, [see *Veerasami* v. *Athi* (17) and *Krishnaji Raghunath Kothavale* v. *Anandrav Ballal Kolhalkar* (18) but later cases noted by my learned brother take a wider view] then it cannot be treated as a revi-

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1. (1903) I L R 26 M 780 (P C).
12. (1894) I L R 20 B 175.
13. (1881) I L R 3 A 484.
15. (1902) I L R 24 A 300.
16. (1906) I L R 28 A 387.
17. (1884) I L R 7 M 595.
18. (1883) I L R 7 B 293.

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val or continuation. Thirdly, an execution petition, if treated as a revival or continuation of the former one, is governed in the matter of limitation by Art. 181 and not 182. On this point there is a mass of authority. The principle is stated, although the actual article applicable is not specified in the Privy Council case in *Qamar-ud-din Ahmad* v *Jawahir Lal* (19) and *Sasivarna Thevar* v. *Arulanandam Pillai* (20). Other reported cases which definitely lay down which article is applicable are the Full Bench case in *Suppa Reddiar* v. *Avudai Ammal* (21), *Chalavadi Kotiah* v. *Poloori Alamelamma* (22), *Ghulam Nasiruddin* v. *Hardeo Prasad* (23) and other cases.

Applying these principles to the present case it would be seen that, even if the application is to be treated as to the continuation or revival of the previous execution petition, the article applicable is 181 and not 182 ; and that article prescribes three years from the date when the right accrued, that is, the right to revive or continue the execution proceedings and to put in the application for a continuation or revival ; so that this plea, even if allowed to the appellant, takes the case no further. This case has to be governed by the considerations already laid down and on the decision of the question when his right to apply occurred under Art. 181.

I therefore agree with the order proposed by my learned brother.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Syed Mahamad Gouse and others ... *Appellants**

Syed Mahamad Gouse, *In re.*

Court Fees Act, S. 7, cl. (5) ; Art. 17, cl. (b) of Sch. II—Applicability—Trustee—Suit for possession of trust property from person claiming under trust but adversely to plaintiff—Court-fee in.

In a suit for a declaration that the plaintiff was the Sajjadanashin of two durgas and for the possession of the durgas and their properties, the Sub-Judge transferred some of the defendants as plaintiffs, made the original plaintiff a defendant, and passed a decree appointing the 1st and 2nd plaintiffs according to the revised cause-title as Muthawallis of the two durgas and directing that

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*S R No 9636 of 1923 in Appeal No. 186 of 1923 and S R Nos. 13674, 12052 and 13423 of 1923. 28th November, 1924.

19. (1905) I L R 27 A 334 (P C).
20. (1891) I L R 21 M 261: 8 M L J 18.
21. (1904) I L R 28 M 50 : 14 M L J 401 (F B).
22. (1907) I L R 31 M 71 : 18 M L J 46.
23. (1912) I L R 34 A 436.

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they should take possession of the durgas and their respective properties. The 6th defendant appealed against that decree praying that he should be appointed trustee of both the durgas in the place of plaintiffs 1 and 2, and the question arose whether the appeal could be valued under Art. 17, cl. (b), Sch. II of the Court Fees Act or whether it ought to be valued under S. 7, cl. (5) of that Act.

Held, that the case fell under S. 7, cl. (5), and that Art. 17, cl. (b) was inapplicable.

Reference under S. 5 of the Court Fees Act regarding the Court-fee to be paid in Stamp Register Nos. 9636 (Appeal No. 186 of 1922), 13674, 12052, and 13423 of 1923 being appeals preferred to the High Court against the decree of the Court of the Subordinate Judge of Mayavaram in O. S. No. 10 of 1909 (O. S. No. 15 of 1908 on the file of the District Court of South Arcot).

The Advocate-General and *K. S. Desikan* for appellant in S. R. No. 9636 of 1923.

A. Viswanatha Aiyar for appellant in S. R. No. 13674 of 1923.

L. A. Govindaraghava Aiyar for appellant in S. R. No. 13423.

S. Varadachariar for the *Government Pleader* on behalf of the Government.

The Court made the following

ORDER IN S. R. NO. 9636 OF 1923 IN APPEAL NO. 186 OF 1923 :—This is a reference under S. 5 of the Court Fees Act as regards the proper Court-fee to be paid on the memorandum of appeal filed by the 6th defendant.

This suit out of which this appeal arises was instituted by the plaintiff for a declaration that he is the Sajjadanashin of two durgas in the South Arcot District and for the possession of the durgas and their properties. The plaintiff alleged that he was appointed by the last Sajjada as his successor and that he took possession of the durgas and the properties on the last Sajjada's death, but that he was subsequently dispossessed by the 1st defendant, one of the heirs female of the original family of the founder. The Lower Court holding that the plaintiff was not nominated by the last Sajjada and also that he was not the nearest male heir, dismissed the suit. On appeal by the plaintiff, the High Court remanded the suit to the Lower Court to rehear the case after bringing on record the descendants of the original founder and to appoint a trustee from amongst them, since the last Sajjada

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had failed to nominate his successor. After remand the plaintiff compromised the suit with the 1st defendant and asked for permission to withdraw it, but the Court refusing such permission transposed some of the defendants as plaintiffs, made the original plaintiff a defendant, and proceeded with the suit. By his decree, dated 27th March, 1923, the Subordinate Judge appointed the 1st and 2nd plaintiffs, according to the revised cause-title, as Muthawallis of the two durgas on probation for a period of three years and directed that they should take possession of the durgas and their respective properties (*see* cls. 1, 3, 4 and 6 of the decree). The decree also provided that the surplus income after meeting the expenses of the durgas should be distributed amongst the members of the family. The 6th defendant in his appeal against this decree prays that he should be appointed trustee of both the durgas in the place of plaintiffs 1 and 2.

In the Lower Court and previously in this Court on appeal, Court-fees were paid *ad valorem* on the value of the plaint properties. The appellant now seeks to value his appeal under Art. 17, cl. (*b*), Sch. II of the Court Fees Act on the ground that it is not possible to estimate at a money value the subject-matter in dispute ; on the other hand, it is contended by Mr. Varadachariar, on behalf of the Government, that the case is governed by S. 7, cl. (5) of the Court Fees Act and that the appellant should pay *ad valorem* Court-fee on the value of the suit properties.

The main argument of the learned Advocate-General on behalf of the appellant is this :—If the suit had been against persons claiming adversely to the trust, *ad valorem* Court-fee might have to be paid ; but in a case like the present, where all the parties to the suit claim the properties for and on behalf of the trust, the only point in dispute is as to who amongst them is entitled to manage the trust properties and as that, *viz.*, the right of management is incapable of valuation, the proper article applicable is Art. 17, cl. (*b*), Sch. II of the Court Fees Act. This argument appears to me to be untenable, because, though the defendants do not claim the properties adversely to the trust, they do claim the right to hold them adversely to the plaintiff and therefore plaintiff has necessarily to ask for relief by way of possession as against them. In *Ramadoss* v. *Hanumantha Rao* (1), relied upon for the

1. (1911) I L R 36 M 364 : 21 M L J 952.

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appellant, the lands were in the possession of persons who were willing to pay rent to the plaintiff as soon as he recovered the office of Dharmakartha. In distinguishing the case before them from the decision in *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (2) and the other case brought to their notice the learned Judges indicate their opinion that, if the possession had been adverse to the plaintiff, then it would have been necessary for him to sue for the relief of possession, also *see* page 366. In *Sonachala* v. *Manika* (3) where the plaintiffs prayed for a decree for the removal of the defendant from the management of properties endowed for charity and for the appointment of himself as the manager thereof, it was held that the plaintiff was to sue for possession of the properties and that he should pay *ad valorem* Court-fee under S. 7 of the Court Fees Act.

Reference has been made by Mr. Govindaraghava Aiyar, the learned vakil for the appellant in the connected S. R. No. 13423 of 1923 in which also the same question is raised, to the decisions in *Thakuri* v. *Brahma Narain* (4), *Girdhari Lal* v. *Ram Lal* (5) and *Ramrup Das* v. *Mohunt Sitaram Das* (6). These are cases under S. 92 of the Civil Procedure Code and do not really help him. Shortly stated, what was decided in those cases was that in suits coming under S. 92 (S. 539 of the old Code) of the Civil Procedure Code, the mere inclusion in the plaint of a prayer either for account, or for the appointment of plaintiffs themselves as trustees, does not render the plaintiffs liable to pay *ad valorem* Court-fee on that part of their plaint. The suit which has given rise to this appeal is not one under S. 92 of the Civil Procedure Code, nor does it possess the essential characteristics of such a suit. It cannot also be said that the nature of the suit has in any way been altered subsequent to the remand by the High Court.

It has been further urged on behalf of the appellant that since the plaintiff sues for trusteeship only and has no beneficial or personal interest in the properties in his capacity as trustee, no *ad valorem* Court-fee need be paid. This argument receives a certain amount of support from the observations of Spencer, J., in his Order of Reference to the Full

2. (1910) I L R 33 M 452 : 20 M L J 301.
3. (1885) I L R 8 M 516.
4. (1896) I L R 19 A 60.
5. (1899) I L R 21 A 200.
6. (1910) 12 C L J 211.

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Bench in *Ramamirtha Mudaliar* v. *Govinda Mudaliar* (7). With all respect, I am unable to see how the question as to whether the plaintiff has or has not any beneficial interest in the properties that he sues for, can make any difference as regards the Court-fee payable by him. A guardian of a minor, for instance, suing on behalf of his ward for recovery of possession of immoveable property has no beneficial interest in the property, but I do not think that it can be argued that he need not pay *ad valorem* Court-fee under S. 7, cl. (5), when he sues for possession of properties of the ward.

It seems to me that in determining the amount of Court-fee payable in these cases the sole question to be considered is, what is the "subject-matter" of the suit. As already pointed out in a case like the present one, the plaintiff is bound to ask for possession and the plaintiff here has, as a matter of fact, prayed for possession of the trust properties. So far as this relief is concerned, the suit, in my opinion, falls under S. 7, cl. (5), Court Fees Act, and the appellant should pay Court-fee under that section. As in my view the case comes under S. 7, cl. (5), it follows that Art. 17, cl. (*b*) is inapplicable. I give six weeks' time for the appellant to pay the necessary Court-fee.

In S. R. Nos. 13674 *of* 1923, 12052 *of* 1923 *and* 13423 of 1923 :—The same question arises in these stamp reference numbers which deal with the other appeals filed against the Lower Court's judgment. The order passed in S. R. No. 9636 of 1923 will apply to them also.

These Court-fee references again came on for hearing on 6th November, 1924.

The Advocate-General and *K. S. Desikan* for appellant in S. R. No. 9636 of 1923 (Appeal No. 186 of 1923).

A. Viswanatha Aiyar for appellant in S. R. No. 13674 of 1923.

C. R. Mahadeva Aiyar for *C. V. Anantakrishna Aiyar* for appellant in S. R. No. 12052 of 1923.

L. A. Govindaraghava Aiyar for appellant in S. R. No. 13423 of 1923.

S. Varadachariar for the *Government Pleader* on behalf of the Government.

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7. C R P No. 862 of 1917.

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The Court made the following Additional

ORDER :—These stamp references were posted to be spoken to at the instance of Mr. Govindaraghava Aiyar, but after hearing the arguments of the learned vakils on both sides, I do not see any reason to modify or alter the order which I have already made.

The only point now urged by Mr. Govindaraghava Aiyar is that the decision of this Court reported in *Swaminatha Aiyar* v. *Ramier* (8) is against the view which I have taken in my prior order and that I should, therefore, reconsider my order in the light of the said decision. I will assume that if the decision in *Swaminatha Aiyar* v. *Ramier* (8) has really taken a contrary view, it is open to me to reconsider my order. In that case the plaintiffs sued for a declaration that they and the 1st defendant were the lawfully appointed trustees of a certain temple ; and they prayed for a direction that defendants 2 and 3 should be made to restore the office of trustee to them and for an injunction restraining them from interfering with the exercise by the plaintiffs and the 1st defendant of their duties as trustees. The tenants who were in possession of the properties were willing to pay the rents to whomsoever was the proper trustee. It was held that the plaintiffs were not bound to sue for the possession of the temple properties and their omission to sue for such possession did not offend against the proviso to S. 42 of the Specific Relief Act. The learned Judges had not to consider the question as to what is the Court-fee payable if the plaintiffs had, as a matter of fact, asked for possession and nowhere do they say that in such a case *ad valorem* Court-fee need not be paid. Even as regards the necessity of asking for possession where the plaintiff alleges that some others had illegally taken possession of the temple lands, the learned Officiating Chief Justice states thus when distinguishing the case in *Rathnasabapathi Pillai* v. *Ramaswami Pillai* (2) :—"The maintainability of the suit must depend upon the allegations in the plaint....... In this plaint he [the plaintiff in the case in *Rathnasabapathi Pillai* v. *Ramaswami Pillai* (2)] mentioned that the defendants 8 and 9 had illegally taken possession of the temple lands and leased out the fishery in the tank and collected rent. The plaintiff in that case having, for reasons best known to himself, combined two actions in one, namely, one action against the

2. (1910) I L R 33 M 452 : 20 M L J 301.
8. (1924) 47 M L J 671.

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Temple Committee for the restoration of his trustee's office and for damages, and a second action for the recovery of the trust properties against persons who had wrongfully dispossessed him of such property, was bound to ask for the relief of possession of the temple properties to which he asserted a present right of possession. On the allegations in the plaint in that suit it may have been right to require the plaintiff to add a prayer for possession of the lands, and if he refused to do so, his suit might have been dismissed. But he was not bound to sue for possession of the lands before he was restored to office. If he had chosen to strike out from his plaint his statement as to the part played by defendants 8 and 9, he might have waited till he was restored to his office of trustee, and he might then have brought a separate suit on behalf of the trust to recover the trust properties which had been wrongfully alienated. The plaintiff in the present case alleges in his plaint that he was dispossessed by the 1st defendant and asks for possession from him, and I do not think that the remand by the High Court and the subsequent re-arrangement of the parties can in any way alter the nature of the case. It is not necessary for me to decide whether even in this case the plaintiff is bound to ask for possession. But as possession has been asked for and as the decree also directs that the durga should be taken possession of, I think that Court-fee should be paid under Art. 7, cl. (5) of the Court Fees Act. Time for payment of the Court-fee is extended by six weeks from to-day in all the references.

A. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Malyala Surayya and others ... *Appellants** (*Plaintiffs*)

v.

Rajah Saheb Meharban Idostan Sree Rajah Ravu Venkata Kumara Mahipathi Surya Rao Bahadur Garu, Sirdar, Rajahmundry Sircar and Rajah of Pithapuram ... *Respondent* (*1st defendant*).

Malyala Surayya *v* Venkata Kumara Mahipathi Surya Rao Bahadur.

Madras Estates Land Act, Ch. XI—Record of Rights—Suit challenging correctness of—Desapandya inams—Entry as part of Zamindari estate—Nature

*S A Nos. 1075, 1583, 1632, 1649 to 1653 and 1744 of 1922. 13th November, 1924.

Malyala Surayya v. Venkata Kumara Mahipathi Surya Rao Bahadur.

of inams—If included in the assets at the time of Permanent Settlement—Determination of—Considerations—Tenants claiming occupancy rights—Case found against by Trial Court—No appeal by tenants—Reversal of finding—Powers of Court—Civil Procedure Code, O. 41, R. 33.

The Record of Rights prepared under Chapter XI of the Estates Land Act with reference to Pithapuram Zamindari showed certain Desapandya inam lands owned and enjoyed by the inamdars for a long time before the Permanent Settlement of 1802 as part of the Zamindari and the tenants as having occupancy rights. The inamdars sued for a declaration that they were incorrect. The Trial Court found that the Desapandya inams had been excluded from the assets of the Zamindari at the time of the Permanent Settlement and that the tenants had no occupancy rights. The Zamindar alone appealed and not the tenants, but still the Appellate Court reversed the findings of the Trial Court on both points.

Held, (1) the *russooms* by which the Desapandyas were paid were alone included in the assets of the Zamindari and that did not make the lands part of the estate ; (2) the lands were originally occupied by the Desapandyas improperly, the then Government being either unable or unwilling to disturb their possession and at the time of the Permanent Settlement the lands were left in the possession of inamdars and in the absence of evidence as to resumption by the Government it could not be held that they were made part of the Zamindari ; (3) the lands being in the nature of ryotwari lands held under the Government, an arrangement by the Government with the Zamindar could not convert a ryotwari holder into a ryot under a Zamindar without his consent and in the absence of legislative sanction ; and (4) the tenants not having appealed against the finding that they had no occupancy rights, the Appellate Court had no power to reverse that finding under O. 41, R. 33, Civil Procedure Code.

The nature and history of *Desapandya inams* considered.

There is no law against a person having a ryotwari tenure within the ambit of a Zamindari.

Appeals against the decrees of the District Court of Godavari at Rajahmundry in A. S. Nos. 103 of 1920, 89 and 102 of 1920, 109 of 1920, 104 of 1920, 105 of 1920, 106 of 1920, 107 of 1920, 108 of 1920 and 110 of 1920 preferred against the decrees of the Court of the Temporary Subordinate Judge of Cocanada in O. S. Nos. 31 of 1919, 30 of 1919, 37 of 1919, 32 of 1919, 33 of 1919, 34 of 1919, 35 of 1919, 36 of 1919, and 38 of 1919 respectively.

C. Rama Rao, V. Viyyanna, D. Appa Row and *B. Somayya* for appellants.

A. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is a batch of nine appeals. The same point arises in all the appeals. The plaintiffs' suit is for a

declaration that the Record of Rights made under Chap. XI of the Estates Land Act is incorrect in several particulars. The 1st defendant is the Rajah of Pithapuram, the other defendants are the tenants of the plaintiffs. Several issues were raised in all the cases and they were found by the Subordinate Judge in favour of the plaintiffs. The 1st defendant alone appealed against the decree of the Subordinate Judge. The tenants who were found not to have any occupancy right in the lands did not appeal against the decree of the Subordinate Judge. The District Judge has reversed the decree of the Subordinate Judge and dismissed the plaintiffs' suit. The plaintiffs have preferred these second appeals.

The main question in these appeals is whether the suit lands were included in the assets of the Pithapuram Zamindari at the time of the Permanent Settlement so as to form part of the estate. The suit lands were enjoyed before the Permanent Settlement of 1802 by Desapandyas. Desapandyas is described in the Fifth Report on *East India Affairs*, Vol. III, page 24, thus :—

"The next revenue officer of rank, and of the same class with the *desmook*, though of greater utility and sometimes of more extensive local jurisdiction, was the *despandeah cannongoe*, or provincial register. To ensure the honest full discharge of a very important trust, a *russoom* of two and a half per cent. on the revenue, ascertained by his own vouchers to have been collected throughout the country, was assigned to the public register, his heirs, and deputies in perpetuity."

At the time of the Permanent Settlement the Government abolished these offices and added the *russoom* of two and a half per cent. of the total collections to the peishcush of the Pithapuram Zamindari. The District Judge holds that by including the *russoom* in the peishcush or permanent zummah payable by the Zamindar, the lands in the possession of the Desapandyas became part of the Zamindari. Mr. Rama Rao for the appellant contends that the documents relied upon by the District Judge for his finding, Exs. II, III and IV, have been misconstrued by him and they do not bear out the inference drawn from them.

Ex. II is the *kabuliyat* executed by the Zamindar of Pithapuram on 6th May, 1903. That all *lakhiraj* and alienated lands were excluded from the Zamindari is clear from the following recital :—

"Exclusive of *lakhiraj* lands (lands exempt from the payment of public revenue) and of all other alienated lands paying a small quit rent

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(which quit rent unchangeable by me is included in the assets of my Zamindari or estate)."

It is urged for the appellants that the lands in the possession of the plaintiffs are such alienated lands. There is no evidence that these lands were granted as *manyams* by the Zamindar. It is admitted that the Desapandyas held these lands from long before the date of the Permanent Settlement. An attempt was made by the 1st defendant to show that these lands were granted by him after the Permanent Settlement but that is found against by the Lower Courts and no serious attempt was made before me to dispute that finding. Mr. Krishnaswami Aiyar attempted to justify the 1st defendant's contention by showing that the Zamindar recognised the persons in possession of the lands owned by the Desapandyas as inamdars appropriated the pension paid for the maintenance of the Desapandyas who were thrown out of office Assuming it was so, that would not make the lands grants by the Pithapur Zamindar. The question is whether the Government, by including the *russoom* in the amount payable by the Zamindar to the Government, made the lands in the possession of the Desapandyas part of the estate of Pithapuram. What appears from Ex. IV is the Government added what was payable to the Desapandyas for their collection of the revenue to the amount payable by the Zamindar and made him collect the revenue ; in other words, the Government was entitled only to 97 1|2 per cent. after deducting 2 1|2 per cent. due to the Desapandyas for collection and when their services were dispensed with, the 2 1|2 per cent. was added to the amount payable by the Zamindar.

When the Government dispensed with the services of the Desapandyas they proposed to give them a pension for life. This is clear from Ex. III, letter to the Collector, dated 8th December, 1802 :

"The Governor in Council, at the recommendation of the Special Commission, has been pleased to abolish the office of Desapandya in the 1st Division of Masulipatam and to incorporate the *russooms* of that office with the permanent assessment. Considerations of indulgence to the individuals filling the office of Desapandya induced the Commission to recommend that pensions for life should be granted to those individuals ; that recommendation having been approved, the Commission desire you will furnish them with a list of the Desapandyas and the amount of the annual pension you will propose should be granted to each."

The contention of the 1st defendant is that the pension was received by the Zamindar and he allowed the

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Desapandyas, whose services were dispensed with, to be in occupation of the lands in their possession and is placed on a statement contained in Ex. B. But the Zamindar did not resume the Desapandya inams. He entered into a compromise with the holder of the inams, and agreed to take their pensions and allow them to enjoy their lands as usual. There is no evidence as to what really happened at the time. No accounts have been produced by the 1st defendant to show how much was received in respect of pensions and what arrangements were made with the persons in occupation of the lands. It appears that the Desapandya inams were mixed up with the Karnam inams and Mr. Chenchal Rao separated the Karnam inams from the Desapandya inams but did not make any settlement as regards the Desapandya inams. The concluding sentence in his report is, "Of course by deducting it from our accounts, we do not confer any new power on the Zamindar to resume their land without their consent or the decree of any judicial tribunal." It is clear that nothing was done with regard to them at the time of the inam settlement.

The contention of Mr. Krishnaswami Aiyar is that when the *russooms* or *manyams* were included in the assets or *peishcush* of the Zamindari it must be considered that the lands became part of the Zamindari. If the lands were originally granted by the Zamindar to the Desapandya and were resumable by him no doubt this argument would be of considerable force. But from the Fifth Report, Vol. III, page 24, it is clear that the Desapandyas were in unauthorised occupation of lands and enjoyed their income. "In lieu of this commission, however, at present there are a number of inferior Desapandyas claiming a right to free *mirassi*, hereditable villages, or to others held by a tenure called *bilmokta* or *tatoodarry*, at a low unalterable rent, but all these we apprehend to be improper, unauthorised alienations made by the desmooks or other officers of Government in power, to purchase greater defalcations in their own favour from the stated dues of the exchequer." In the absence of definite evidence that the Zamindar granted these lands, it must be held that the lands were occupied by the Desapandyas improperly and the then Government of the country were either unable or unwilling to disturb their possession, and at the time of the Permanent Settlement they were not dispossessed of their lands but were

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evidently allowed to be in possession and the Desapandyas whose services were dispensed with were further remunerated by pensions. In the absence of any evidence as to resumption by the Government, it cannot be said that the Government added these lands to the Zamindari or made them part of it. These lands having been held under the Government were in the nature of ryotwari lands and it is difficult to understand how the Government could by entering into an arrangement with the Zamindar convert a ryotwari holder into a ryot without his consent. It was no doubt open to the Government to dispossess the Desapandyas of the lands in their possession and to hand them over to the Zamindar. But in this case there is no evidence that they were dispossessed by the Government or that the Zamindar entered into any relations with them after the date of the Permanent Settlement. It is open to the Government to enter into an arrangement with the Zamindar to keep the ryotwari tenure as such and to give him the right to collect the revenue payable to Government, but in the absence of clear evidence it should not be lightly held that the Government made a ryotwari tenant a ryot under a Zamindar. The Government have no power in the absence of Legislative sanction to convert a ryotwari tenure into a ryoti tenure in an estate.

The appellant relies upon the decision of this Court in support of his contention in C. R. P. No. 199 of 1918 and S. A. No. 1826 of 1917. These two cases arose out of a dispute between Desapandya inam holders and their tenants in the Zamindari of Pithapuram. Sir William Ayling in disposing of C. R. P. No. 199 of 1918 observed: "The inam was granted by Government prior to the Permanent Settlement and the arrangement effected between Government, Inamdar and the Zamindar at the time of the Permanent Settlement was a private arrangement which did not make the land a portion of the estate." I respectfully agree with this observation. In S. A. No. 1826 of 1917 Ayling and Krishnan, JJ., approved of the view of the Subordinate Judge that the inams could not be brought under the category of " estate " within the meaning of the Estates Land Act. It follows that within the ambit of an estate there could be ryotwari holdings, and in such cases the Zamindar collects the amounts due to the Government as observed by the Subordinate Judge as only an agent for the Government.

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The absence of any evidence to show what was done after the settlement by the Zamindar in respect of these lands is strong proof of the fact that these lands were not included and made part of the estate. Exs. II, III and IV do not bear out the construction placed upon them by the District Judge. There is no evidence that any amount was paid to the Zamindar by the holders of these lands for their being in possession of them. Granting for argument's sake that the Zamindar did receive the pension payable to the Desapandyas during their life-time, the mere fact that he received it could not have changed the character of the tenure of these lands. I hold that the finding of the District Judge that the suit lands were included in the Pithapuram Zamindari at the time of the Permanent Settlement so as to form a part of the Pithapuram Estate is not warranted by the recitals in Exs. II, III and IV and I hold there is no evidence to show that these lands became part of the Pithapuram Estate.

The next point urged for the appellant is that the District Judge ought not to have dismissed the plaintiffs' suit inasmuch as the other defendants had not appealed against the decree of the Subordinate Judge. Mr. Krishnaswami Aiyar for the respondent contends that the Court has power to give a decree in favour of the persons who have not appealed under O. 41, R. 33 of the Code of Civil Procedure. In this case the 1st defendant's contention is that the lands form part of the Zamindari. The contention of the other defendants is that they have got permanent occupancy right in the lands. Even though the lands form part of the Zamindari the plaintiffs may have a right to the kudivaram as well, as the plaintiffs' right to have both varams is not inconsistent with their lands being a part of the Zamindari. There is no law against a person having a ryotwari tenure within the ambit of a Zamindari. It does not necessarily, therefore, follow that simply because the plaintiffs' lands are in the Zamindari, the tenants have occupancy right. Inasmuch as the Subordinate Judge found on the evidence that the tenants had no occupancy right and inasmuch as they did not choose to appeal against his decree it was not proper for the District Judge to have dismissed the suits. The upholding of the contention of the 1st defendant would not in any way militate against disallowing the contention of the tenants who are the other

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defendants. That being so, in any view of the case I think the District Judge's judgment as regards the relief claimed by the plaintiffs against their tenants cannot be upheld.

In the result the appeals are allowed and the decree of the District Judge is set aside and that of the Subordinate Judge restored with costs in the Court as well as in the Lower Appellate Court.

T. S. V. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Kruthiventi Perraju Garu ... *Petitioner** (*Plff.*)

v.

Sri Nallapuraju Mirja Sitaramachandraraju Garu and others ... *Respondents* (*Defts.*)

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Hindu Law—Joint family—Father or other manager—Debt of—Rate of interest for—Necessity—Presumption—Onus of proof—Rate prima facie *high but not exorbitant—Rate exorbitant—Distinction—Mortgage by father for necessity—Rate of interest also necessary—Suit upon mortgage against father and his sons—Reduction of amount of interest on ground that father improvidently defaulted to pay interest as it fell due, caused payment of compound interest and allowed interest to accumulate to a very large amount—When permissible.*

The manager of a joint Hindu family, whether the father or not, is not entitled in law to borrow money at an exorbitant rate of interest unless there was necessity for such a rate, and, if the rate of interest is excessive, the onus will be on the lender to show that there was necessity for such an onerous rate.

A Court has no right to presume without evidence that any particular rate of interest is onerous, and those attaching the transaction must first show *prima facie* that the rate of interest is unnecessarily high for the circumstances of the case. It may be that in certain cases the original rate of interest is *prima facie* so excessive that proof is practically unnecessary and that the lender must know that it is his duty to show necessity for it. But in other cases it may be that the rate, although high, is not so high that the lender should reasonably take it for granted that he has to explain it, even though the Court does not call upon him to do so. In such a case, he cannot reasonably be mulcted if he does not explain it. When the Trial Court has not considered it necessary to call on the lender to explain the rate of interest, and no issue has appraised him that it is necessary for him to explain it, Courts of Appeal should not interfere without giving him an opportunity to explain it, unless the rate is so monstrous as to be unconscionable in any conceivable set of circumstances.

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*C M P Nos. 2561 and 3092 of 1923. 18th December, 1924.

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The suit was to enforce a mortgage bond, dated 9th May, 1901, executed by the 1st defendant, the undivided father of defendants 2 to 6 and the manager of the joint family. The bond was for Rs. 11,000 and the interest stipulated for in it was 12 3/8 per cent. compound interest. Nothing having been paid for the mortgage the amount due under it at the date of suit was one lakh and seven thousand and odd.

It was either admitted or found that the father *bona fide* was in urgent need of money and could not have got it at a lower rate of interest than that stipulated for in the mortgage. No case of undue influence was proved. There was no suggestion that the mortgagee wilfully allowed default so as to take advantage of an improvident man and to pile up the debt swiftly. On the other hand it appeared that the mortgagee warned the mortgagor of the rapidity with which the debt was swelling. Nevertheless the Court below reduced the interest payable so as to make the whole amount due from the defendants Rs 45,000 and odd, obviously swayed by the hardship on the sons losing practically the whole of their estate owing to the improvidence of their father in failing to pay interest as it fell due and thereby causing payment of compound interest to become necessary.

Held, that the Court below erred in reducing the amount payable on the mortgage even as against the sons.

The loan and the rate of interest being either admitted or found to be necessary, the father was in law justified in borrowing at that figure, and the aftermath of the transaction is irrelevant to the consideration of whether he was justified or not.

Petitions under R. 13 of the Agency Rules (Civil Justice) praying that on the grounds set forth therein the High Court will be pleased to issue an order directing the Additional District Judge, Agency Division, Waltair, to review his judgment, dated 30th April, 1923, in A. S. No. 2 of 1923, preferred against the decree of the Court of Judicial Assistant Commissioner, Agency Division, Vizagapatam, dated 23rd May, 1922 in O. S. No. 7 of 1921.

C. Sambasiva Rao and *C. V. Anantakrishna Aiyar* for petitioner.

S. Varadachariar for *K. Venkataramana Raju* for respondents.

The Court made the following

Odgers, J.

ORDER :—*Odgers, J.* :—This is a petition by the plaintiff for an order directing the Additional District Judge of the Agency Division, Waltair, to review his judgment and decree in A. S. No. 2 of 1923, dated 30th April 1923. The suit came to the Additional District Judge on appeal from the

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Judicial Assistant Commissioner of the Agency Division, Vizagapatam, in a mortgage suit on a bond dated 9th May, 1901, executed by the 1st defendant in favour of one K. Perrazu, said to be the adoptive father of the plaintiff. The 1st defendant is the undivided father of the defendants 2 to 6 and the manager of the joint family. No less than 14 issues were originally framed in the case and there is in fact a petition by the defendants 2 to 6 against the findings of the learned Additional District Judge on points of adoption, limitation and the binding nature of the mortgage. These points were all given up before us, and the petition is confined to the conclusions arrived at by the learned Judge in paragraph 8 (*a*) to (*f*) of his judgment.

The dealings between the parties began on the 12th December, 1892 by a promissory note of that date for Rs.600 at 18 per cent., Ex. D. This was followed by a promissory note of 4th February, 1893, Ex. D-2 for Rs. 600 at 12 per cent., and also on the 7th May, 1895, Ex. D-1 for Rs. 1,000 at 12 per cent. Nothing having been paid on any of these promissory notes, they were consolidated into a mortgage on the 11th November, 1895, Ex. L for Rs. 6,000 at 10 1|8 per cent. payable on the 11th November every year, in default interest to be paid compounded, the whole principal and interest being repayable on the 11th November, 1897 ; and if it is not paid within that time interest shall be at 12 per cent. compound. Nothing having been paid under this, the further suit mortgage, Ex. S, dated 9th May, 1901 for Rs 11,000 was executed at Re.1-0-6 or 12 3|8 per cent. compound interest. Nothing having been paid for this mortgage the plaintiff instituted the suit for no less than Rs. 1,07,000 odd. The learned Additional District Judge evidently impressed, I think, with the way in which this debt has accumulated, has reduced the interest payable so as to make the whole amount due from the defendants Rs. 45,000 odd. The learned Additional District Judge in paragraph 8 (*a*) to (*f*) considers whether the bargain was harsh and unconscionable based on undue influence by the mortgagee or the inherent harshness of the bargain. It may be said at once that no case of undue influence was proved, and in fact I think it is fair to say that the contention of the parties and their counsel was not really focussed on this point of excessive interest until the last moment. Their attention was concentrated on that date on the more im-

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portant points of adoption, limitation, etc., and Mr. C. Sambasiva Rao, Barrister-at-Law, who was present at the hearing in the Additional District Court,has stated to us that it was only in the later stages in the hearing of the appeal that this point was raised and was pressed on the attention of the learned Judge owing to counsel and the vakils in the case having received a copy of the Privy Council decision in *Ram Bhujwan* v. *Nathu Ram* (1) which will be presently noticed. The suit had a curious history. It began as O. S. No. 41 of 1913 before the Subordinate Judge of Cocanada, some of the properties being situated in the Godavari District and some in the Agency. The plaintiff got a decree and costs. Execution was taken of the properties within the ordinary jurisdiction and a small sum was recovered. As for the balance due the decree was transferred to the Agency Judge for execution. It was held, however, that a fresh suit must be brought in the Agency Court. So O. S. No. 7 of 1921 was filed in consequence. The learned Judges held in *Ram Bhujwan* v. *Nathu Ram* (1) that where, as here, the manager of a Hindu family borrows money on the mortgage of a family property, it must be proved that there was necessity to borrow at the rate contracted for and secondly, that it was not unreasonable to borrow at some such high rate and upon such terms. The learned Judge took these propositions from the judgment in *Ram Bhujwan* v. *Nathu Ram* (1) where they are quoted from *Nawab Nazir Begam* v *Rao Raghunath Singh* (2) and this is the law report referred to by Mr. C. Sambasiva Rao in his statement to us from the bar. The learned Judge proceeds : " The main thing is to see its results show that the terms taken as a whole were harsh and unconscionable." On the other hand the Privy Council in a case reported in *Lala Balla Mal* v. *Ahad Shah* (3) say that it is misleading to have regard to the result alone. Their Lordships say : " It is not enough—indeed, it is misleading—to look at the result alone. * * * * *A borrower who obtained a loan secured by a promissory note on a quite reasonable basis, by neglecting to pay the note at maturity, further neglecting to pay the accruing interest for the several years following, and then giving a renewal note for the original debt *plus* the capitalised interest, could produce a result which might at first sight appear oppress-

1. (1922) 44 M L J 615 (P C).
2. (1919) I L R 41 A 571 : 36 M L J 521 (P C).
3. (1918) 35 M L J 614 (P C).

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ive, and yet there would be nothing harsh or unconscionable in the creditor's demand, since the added interest only accumulated while he forebore to enforce the payment of the sums from time to time due to him." As to this the learned Judge himself says: "There is no suggestion that the mortgagee wilfully allowed default so as to take advantage of an improvident man and to pile up debt swiftly; on the other hand it is clear that the mortgagee warned the mortgagor of the rapidity with which the debt was swelling." The learned Judge is obviously swayed by the hardship on the younger sons losing practically the whole of their estate owing to the improvidence of their father, not in borrowing the money for interest as it was in fact admitted or found to exist, but in failing to pay interest as it fell due and thereby causing payment of compound interest to become necessary.

Ordinarily speaking it is extremely doubtful whether the sons would have been allowed to raise this plea at all. The issues taken as regards this point are issues 3 and 11. The third issue is : Is the suit mortgage debt binding on the defendants 2 to 6 ? It is contended for the sons that this issue opens the whole point of the liability of sons for the father's debts created by the mortgage. This point is considered at length by the learned Judge in paragraph 8 (*a*) to (*f*) and he agrees with the Lower Court that the mortgage is a valid charge on the joint family property. The question that it lay on the plaintiff to show that the father could not raise money at a lower rate is not considered in that part of the judgment and it is perfectly clear to me that neither side at the hearing of the appeal contemplated that Issue No. 3 would admit that discussion at all. The only other issue properly referrable to the point is Issue No. 11, whether the interest claimed is usurious and penal. On an examination of the respondent's grounds of appeal to the Lower Appellate Court, the only grounds urged are that the enhanced rate of interest provided for in Ex. L and carried into Ex. S is penal and unconscionable and that the LowerCourt erred in thinking that it had no power to give relief for the usurious and preposterous claim. Cases have been cited to us by the learned vakil for the respondents to show that the pleadings in this country are to be leniently considered. He contends that practically any objection to the transaction can be made to raise this point as to the binding nature of the interest claimed. He points for example to

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Gangapershad Sahu v. *Maharani Bibi* (4). There the issue was whether the defendant is bound to pay off the debt. It was held that that enabled the question of the amount to be raised. I cannot, speaking personally, see why in this case the issue could not have been clearly and distinctly taken. One view of it was certainly advanced in Issue No. 11, but Mr. S. Varadachari for the respondents quite frankly says that their case here is not for relief under S. 74 of the Contract Act. He based his case entirely on the Hindu Law. I have carefully considered all the cases that we have been referred to. The principle laid down in *Nazir Begam* v. *Rao Raghunath Singh* (2) is that where there is no evidence on either side, *i. e.*, as to the necessity for borrowing at the particular rate. Their Lordships of the Privy Council would relieve where "the thing speaks for itself." This is the case previously quoted by the later decision of their Lordships in *Ram Bhujwan* v. *Nathu Ram* (1). Their Lordships holding that, although there may be necessity to borrow, it is open to the defendants to show that there was no necessity to borrow on the onerous terms of the mortgage. In that case the rate was Rs. 2-8-0, 30 per cent., simple, and in default Rs. 3-2-0 or 37 1|2 compound. So it seems to me that before any question of reduction of the amount in question can be raised, there being no evidence on either side, we must see if "the matter speaks for itself," that is to say, if it is obvious from the terms of the document that an unfair bargain as against the sons has been concluded by the father. The Privy Council cases to which we have been referred, nearly all concern a rate which is obviously very high. In the case just referred to in *Nazir Begam* v. *Rao Raghunath Singh* (2) the sum originally borrowed, Rs. 398, became three lakhs. In *Ram Radha Kishun* v. *Jag Sahu* (5), another Privy Council case, the rate was 24 per cent. compound with half-yearly rests. Their Lordships observe there that it was evident on the face of the document that the interest charged was far in excess of the commercial rates. In *Ram Bhujwan* v. *Nathu Ram* (1) the interest was 36 per cent. compound with quarterly rests. *Nand Ram* v. *Bhupal Singh* (6)

1. (1922) 44 M L J 615 (P C). 2. (1919) I L R 41 A 571 · 36 M L J 521 (P C)
4. (1884) I L R 11 C 379 (P C). 5. (1924) 47 M L J 329 (P C).
6. (1911) I L R 34 A 126.

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refers to a very high rate of interest, the original sum borrowed being Rs. 80 at 27 per cent. compound. In *Manna Lal* v. *Karu Singh* (7) the Privy Council concurred in altering 18 per cent. compound to 18 per cent. simple. In *Ramachandra Prasad* v. *Mahabir Prasad Singh* (8) the Patna High Court held that an agreement to pay compound interest on failure to pay simple is not invalid and does not fall within S. 74 of the Indian Contract Act. It will, I suppose, be agreed that each case must be judged by its own circumstances. In the present case, we have a series of prior transactions between the parties at 12 per cent. and 18 per cent. simple. We have Ex. L with 10 1|8 per cent. simple and in default 12 per cent. compound. Nothing having been paid for over a period of nine years to the lender, the final transaction, Ex. S, which consolidates all the others, reserves a rate of interest at 12 per cent. compound there being no increase on that rate in case of default. It is all very well to consider the case of hardship of the family, but they presumably had the benefit of the amounts borrowed. They have also had what benefit there might be in delaying the payment of interest and principal. That this has now aggregated to a very large sum there is no doubt. But, on the other hand, the interests of the lender who has been kept out of his money for a long series of years have also to be considered and, as stated, there is no evidence that he took any undue advantage of his borrower. On the other hand, he warned him that the sum due was very rapidly growing. I cannot agree that on the face of the document or that the thing of itself speaks of an unjust or unfair transaction as far as the sons are concerned. What the commercial rate of borrowing referred to by their Lordships of the Privy Council in *Ram Bhujwan* v. *Nathu Ram* (1) may be in Cocanada we have no means of knowing. But it is not an unfair inference from the facts as we know them that the lender was not willing to wait for his money any longer unless the borrower consented to pay 12 per cent. compound interest which he had already bound himself to pay by his default in the repayment of the sum borrowed under the previous mortgage, Ex. L. On the best consideration I can give to both the facts and law of this case, I am bound to say, I think, that the learned Additional District Judge was

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1. (1922) 44 M L J 615 (P C). 7. (1919) 13 L W 652 (P C).
8. (1921) 64 I C 247.

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wrong in the view he took of this transaction as far as it affects the sons. In my view the petition must be allowed with costs and the decree of the Additional District Judge set aside and the First Court's decree restored.

C. M. P. No. 3092 *of* 1923 :—This is a petition by the defendants 2 to 6 with regard to the question of necessity of borrowing and its binding character on the sons and also raises the question of limitation and adoption which were not raised before us. It must be dismissed with costs.

The defendants will have six months from this date to redeem.

Wallace, J.

Wallace, J. in C. M. P. No. 2561 *of* 1923 :—I agree. I do not quarrel with the principle that the manager of a joint family, whether the father or not, is not entitled in law to barrow money at an exorbitant rate of interest unless there was necessity for such a rate, and that, if the rate of interest is excessive, the onus will be on the lender to show that there was necessity for such an onerous rate. This involves two principles: firstly, that the rate must be shown to be onerous; and, secondly, that there was pressing necessity at the time of the loan for such an onerous rate. I fail to see how the actual result brought about by the mounting of interest, if not paid, to a crushing figure can affect the second principle. If the manager, *bona fide*, was in urgent necessity for money and could not get it at a lower figure, then he was in law justified in borrowing at that figure, and the aftermath of that transaction is irrelevant to the consideration of whether he was justified or not. The onerous nature of the interest would only be justified reasonably if the necessity for the money at the time of the loan was really urgent. The more urgent the need the less unjustifiable a high rate of interest. Both questions are, therefore, questions of fact to be decided by the circumstances of the case. This is the principle approved by the Privy Council in the case quoted by my learned brother reported in *Lala Balla Mal* v. *Ahad Shah* (3).

Hence it appears to me that a Court has no right to presume without evidence that any particular rate of interest is onerous, at least without affording the plaintiff an opportunity of rebutting that view. A rate *prima facie* harsh may, considering the nature of the security offered, its dubious title or its exigious nature, be perfectly reasonable when the facts

3. (1918) 35 M L J 614 (P C).

Kruttiventi Perraju Garu
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are known. Therefore it seems to me that normally the Courts are not entitled to presume anything either way without evidence and that these questions are entirely matters of proof in the circumstances of each case. Those attacking the transactions must first show *prima facie* that the rate of interest is unnecessarily high for the circumstances of the case. It may be that in certain cases the original rate of interest is *prima facie* so excessive that proof is practically unnecessary and that the plaintiff must know that it is his duty to show necessity for it. But in other cases it may be that the rate, although high, is not so high that the plaintiff should reasonably take it for granted that he has to explain it, even though the Court does not call upon him to do so. In such a case he cannot reasonably be mulcted if he does not explain it. It seems to me not proper that, when the trying Court has not considered it necessary to call on the plaintiff to explain the rate of interest, and no issue has appraised him that it is necessary for him to explain it, Courts of Appeal should interfere without giving him an opportunity to explain it, unless the rate is so monstrous as to be unconscionable in any conceivable set of circumstances, that is, so harsh that no explanation whatever would stand any chance of acceptance by the Courts. Under some such principle I would group the Privy Council cases which have been quoted before us. They resolve themselves into three classes :—firstly, where there is a finding of the Lower Appellate Court, that is, the High Court, a finding of fact that the rate of interest was excessive and the Privy Council saw no good reason to disturb it, such as *Gangapershad Sahu* v. *Maharani Bibi*(4) ; *Harro Nath Rai Choudhri* v. *Randhir Singh* (9) ; *Nand Ram* v. *Bhupal Singh* (6), *Nazir Begam* v. *Rao Raghunath Singh* (2) ; *Aziz Khan* v. *Duni Chand* (10), and *Manna Lal* v. *Karu Singh*(7) ; secondly, the cases in which the Privy Council has reduced the rate of interest awarded by the High Court, such as *Ram Bhujwan* v. *Nathu Ram* (1) and *Ram Radha Kishun* v. *Jag Sahu* (5) in which they restore the Subordinate Judge's finding, that is, the trying Court's finding on the rate of interest. In the former case the initial rate was 36 per cent. compound interest and

1. (1922) 44 M L J 615 (P C).
2. (1919) I L R 41 A 571 : 36 M L J 521 (P C).
4. (1884) I L R 11 C 379 (P C). 5. (1924) 47 M L J 329 (P C).
6. (1911) I L R 34 A 126. 7. (1919) 16 L W 652 (P C).
9. (1890) I L R 18 C 311 (P C) 10. (1918) 23 C W N 130 (P C).

Kruthiventi Perraju Garu v. Sitaramachandraju Garu.

Wallace, J.

in the latter it was 24 per cent. compound interest, rates which the trying Court had already found excessive. In the former case the Subordinate Judge had, on the question of fact, held that the fair commercial rate was 12 per cent. simple interest. The third class of cases is those in which the Privy Council has increased the rate of interest awarded by the High Court and restored the rate of interest awarded by the trying Court, such as *Lala Balla Mal* v. *Ahad Shah* (3). In no case, therefore, has the Privy Council decided "in the air," if I may use that expression, without a finding of fact by one or the other of the Lower Courts, that finding of fact being based also not "in the air" or on an appeal *ad miseri cordiam* but on the circumstances surrounding the transaction.

In the present case, the Judicial Assistant Commissioner, the trying Court, has considered whether the interest could be called usurious or penal and he has found that it could not. The Additional District Judge has given a very halting judgment on this point, based merely on an *ad miseri cordiam* appeal by the sons, and, without considering whether the rate was at the time of the bond excessive in the circumstances of the case, has based his decision entirely on what has resulted purely from the father's failure to pay anything whatever towards either interest or principal, which has caused the interest to mount up to a very large sum.

I should have preferred to send the case back for a finding of fact on this matter of the alleged excessive rate of interest, but I am not prepared to dissent from the order proposed by my learned brother, considering the long delay that has already occurred in the trial of this case, which is chiefly due to the obstructive tactics of the defendants, to which again is due very much of the swelling of the interest. A further remand would have the further result of prolonging the litigation and swelling the interest still more. As has already been pointed out by my learned brother in neither of the Lower Courts was any issue taken on this matter, nor was any plea put forward of any undue influence, while the bond in question was taken in renewal of loans which had run for several years without payment of a pie either for interest or principal. I am not prepared to hold that in the present case the rate of interest is on the face of it excessive or unconscionable.

3. (1918) 35 M L J 614 (P C).

Krithiventi Perraju Garu v. Sitaramachandraraju Garu.

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Under these circumstances I agree with my learned brother that the Additional District Judge was not justified in relieving the sons of their obligations to pay the debt, since they have not shown that the interest was unduly high in the circumstances of the case and it was, therefore, not necessary for the plaintiff to prove necessity for such a rate of interest.

A. S. V. *C. M. P. No.* 2561 *allowed ;*
C. M. P. No. 3092 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Nari *alias* Senjimalai ... *Appellant** (*Prisoner*).

Senjimalai, *In re.*

Indian Penal Code, S. 372—*Customer of brothel—Directing run-away girl to go to brothel—Offence—" Disposal "—Meaning of.*

A customer of a brothel came across a young girl, who had run away from her father's house, and directed her to the brothel. There was no evidence of the passing of any consideration between him and the brothel-keeper. If his intention was not that she should be used for prostitution, the evidence showed he at least knew that she was likely to be so used in course of time. *Held,* he was not guilty of an offence under S. 372, Indian Penal Code, as his act did not amount to selling, letting to hire or otherwise disposing of a minor. The word " disposal " connotes some control by the person disposing over the person disposed of.

Appeal against the order of the Court of 2nd Presidency Magistrate, George Town, Madras Division, in Case No. 18383 of the Calendar for 1924.

K. U. Shama Rao and *A. S. Natarajan* for appellant.

K. P. M. Menon (*The Crown Prosecutor*) for the Crown.

The Court delivered the following

JUDGMENT :—I very much regret to have to set aside the conviction and sentence in this case. I have no doubt whatever in my mind that the accused was a customer in the brothel kept by the prosecution 2nd witness, and on the evidence on the record there seems to be no doubt whatever that he was constantly in the habit of helping her in the business she was carrying on as keeper of the brothel. I have also no doubt, in my mind, when the accused took the girl to the house of the prosecution 2nd witness, if his intention was not that she should be used, it is clear he knew that she was likely to be used in course of time, for purposes of prostitution. In these circumstances, if the words in S. 372 of the Indian Penal Code were:

" Any person who sells, lets to hire or does anything else in the case of any minor under sixteen years, with intent that such minor shall be employed or used, etc. "

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*Cr Appeal No. 529 of 1924. 9th December, 1924.

I should have had no hesitation whatever in finding the accused guilty and confirming the conviction and sentence. But, the words used in S. 372, are "selling, letting to hire, or otherwise *disposing* of a minor." This is not a case of selling or letting. There is no evidence of any passing of pecuniary consideration or any stipulation with regard to such consideration. Did the acts complained of then constitute or amount to disposal of the minor ? The word 'disposal' necessarily connotes, to my mind, some control, at any rate, by the person disposing over the minor disposed of. I do not think it is necessary for my purpose to say more than that, or to seek to define further the connotation of that expression. But in my judgment, there ought to be some evidence at any rate of control over the person disposed of at the time by the person disposing of, before it can be said of him that, by his acts, he disposed of the minor in question. There is, unfortunately, in this case, no evidence whatever of any such control possessed or exercised by the accused. For, all that we are able to see in the evidence, it may be that the accused, who was a customer of the brothel, came across this girl that had run away from her father's house unable to bear the ill-treatment of her step-mother and directed her to the brothel kept by P. W. 2 in order that she may be used for the business carried on by P. W. 2. But such a mere direction of the minor, or recommending her to go over there, would not, in my judgment, constitute a disposal of the minor. I am, therefore, constrained in this case to hold that the accused could not, having regard to the language used in S. 372, Indian Penal Code, be found to have committed the offence under that section. I cannot part with this case, without expressing my surprise that the authorities should have failed in this case to prosecute P. W. 2, who was the person present to be most responsible. Whatever the object of the accused might have been, there is no doubt whatever, that, when the prosecution 2nd witness received the minor into her house, her intention was too obvious to be questioned. However, I am not concerned now with any case against P. W. 2, and, as I have already stated, I am unable to hold that the accused has committed any offence under that section.

The conviction and sentence are, therefore, set aside and the bail bond will also be cancelled.

T. S. V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Sankaran Unni (minor) and another .. *Petitioners** (*Petitioners—Defendants*)

v.

Kummakattil Ezhuvan Kandan's son Raman ... *Respondent* (*Counter-petitioner—Decree holder*).

Sankaran Unni *v.* Raman.

Civil Procedure Code, O. 21, R. 2—Compromise decree—Money directed to be paid by a fixed date—Court closed—Payment into Court on re-opening day—If sufficient compliance—General Clauses Act, S. 10.

A compromise decree provided that the defendant should pay to the plaintiff a certain amount on or before a fixed date and on default the whole amount claimed in the plaint with costs was to be payable. The date fixed fell within the mid-summer recess of the Court, and the plaintiff deposited the money in Court on the re-opening day. *Held,* under O. 21, R. 1 the plaintiff had the option to pay the money either to the party in person or to deposit it into Court and the deposit made on the re-opening day was sufficient compliance with the terms of the decree.

There is a generally recognised principle of law, under which parties, who are prevented from doing a thing, not by any default of their own, but by the Court itself, are entitled to do it, at the first subsequent opportunity. That is a general principle of equity and S. 10 of the General Clauses Act is based on that principle.

Petition under S. 25 of Act IX of 1887 and S. 151 of the Civil Procedure Code, 1908, and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of South Malabar, at Palghat, dated 12th August, 1922, on C. M. P. No. 922 of 1922, in S. C. S. No. 502 of 1921, on its file.

C. S. Swaminadhan for petitioners.

K. Kuttikrishna Menon for respondent.

The Court delivered the following

JUDGMENT:—In this case, the plaintiff obtained a compromise decree, by which if money was paid within the 30th Meenom, 1907 (12th April, 1922) the sum of Rs. 285 was to be taken in full satisfaction of the claim. The decree provided that, in default of such payment, the defendants were to pay the plaintiff the whole of the plaint amount with costs. The defendants put in an application to the Lower Court to have satisfaction entered of the decree, on the ground that he tendered the amount of Rs. 285 to the plaintiff, on the 12th April, 1922, but as the plaintiff did not receive that amount, he sent

*C R P No. 927 of 1922. 28th November, 1924.

Sankaran Unni v. Raman.

it by money order to the plaintiff, which again was refused and he therefore had the money ready with him to be deposited in Court to give a challan to make that deposit. That was on the re-opening day of the Court, after the mid-summer holidays, on the 12th June, 1922. The challan was granted and the money was deposited on the re-opening day. The Lower Court has found that the alleged tender out of Court is not true and in revision I must accept that finding. But it has not considered the question whether the deposit into Court on the re-opening day was not a sufficient compliance with the terms of the decree. No doubt the compromise decree says that the money is to be paid to the plaintiff. But when a decree directs money to be paid to a party, O. 21, R. 1, Civil Procedure Code, lays down that money shall be paid either to the party in person, or shall be deposited into Court. The defendant therefore in this case had the option either of paying the money to the plaintiff, or of depositing the money into Court ; and if he had deposited into Court before 12th April, no question could have arisen and the defendant would have been held to have complied with the terms of the decree. Having had that option, the question then is whether the defendants were not in time, when they deposited the money at the earliest possible opportunity into Court. As 12th April was a holiday, the mid-summer recess having commenced by that time, the earliest day on which the money could be paid into Court, after the 12th April, was the 12th June, and the defendant complied with that condition. It seems to me, therefore, that there was a sufficient compliance with the decree on the part of the defendant and that the Lower Court should have directed the money to be paid over to the plaintiff and entered up satisfaction of the decree. A question similar to this arose in Bombay and it was held by the learned Judges of the Bombay High Court in *Wana Mard Ravji* v. *Natu Walad Murha*(1) that if the plaintiff chose to pay the money into Court, he found that the Court was closed on the due date and he paid it on the earliest day, on which the Court re-opened, such a payment would be a proper compliance with the terms of the decree, for O. 21, R. 1 of the Civil Procedure Code says that the payment may be made into Court, or into the hands of the party. It is contended that this ruling should not be relied upon by me, because the learned Judges of the

1. (1910) I L R 35 B 35.

Sankaran Unni v. Raman

Bombay High Court have misapplied S. 10 of the General Clauses Act. It is quite true that the General Clauses Act deals with the general rules of construction of statutes and the words of S. 10 can hardly be applied to a case, where a certain thing is directed to be done by a decree of Court. But as pointed out in *Sambasiva Chari* v. *Ramasami Reddi* (2) there is a generally recognised principle of law, under which parties, who are prevented from doing a thing, not by any default of their own, but by the Court itself, are entitled to do it, at the first subsequent opportunity. That is the general principle of equity, quite apart from the terms of S. 10 of the General Clauses Act. In fact, S. 10 is based upon that principle. In this case, the defendant had the option to pay either to the plaintiff directly, or into Court. He was entitled to choose between the two. He was prevented from paying into Court, because the Court was closed on the due date. His payment therefore on the re-opening day must, I think, be held to be a sufficient compliance with the terms of the decree. In this view, the order of the Lower Court must be set aside and the revision petition should be allowed. The decree will be entered as satisfied and the money deposited will be paid over to the plaintiff. The petitioner before me will have his costs in this Court and each party will bear his or their own costs in the Lower Court.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Aumanchi Auryaprabhakara Rau and another ... *Appellants** (*Plaintiffs* 1 *and* 3)

v.

Gummudu Sanyasi and others... *Respondents* (*Defendants* 2, 5 *and* 1).

Auryaprabhakara Rau v. Gummudu Sanyasi.

Transfer of Property Act, S. 6 (a)—Inam—Karnam service lands—Agreement to sell after enfranchisement—Validity—Indian Contract Act, S. 65—Suit for refund of purchase money—Limitation.

An agreement for the sale of Karnam service inam lands when enfranchised is only a transfer of an expectancy and offends against S. 6 of the Transfer of Property Act. I L R 39 M 554 ; L R 50 I A 239 followed. The mere fact that the would-be vendor was in physical possession at the time does not make it any the less a *spes successionis*.

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*S. A. Nos. 1469 and 1470 of 1922. 20th January, 1925.

2. (1898) I L R 22 M 179 : 8 M L J 265.

Auryaprabhakara Rau v. Gummudu Sanyasi.

The vendee in such a case can sue for refund of the money advanced by him within three years from the date when the contract was discovered to be void.

Second appeal against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in A. S. Nos. 479 and 480 of 1921 preferred against the decree of the Court of the District Munsif of Vizianagram in O. S. Nos. 520 and 521 of 1916.

B. Satyanarayana for appellants.

Y. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT *in S. A. No.* 1469 *of* 1922 :—The appellants in this appeal obtained an agreement for the sale of certain Karnam service inams from the 1st defendant. This inam undoubtedly formed the emoluments of the Karnam's office and its transfer is forbidden by S. 5 of Madras Act III of 1895. *Prima facie,* it would appear that this contract was a contract to perform something which is forbidden by law and would consequently be void under S. 23 of the Indian Contract Act. It is, however, contended for the appellants that this agreement was not to transfer the inam when it constituted the emoluments of the Karnam's office, but to transfer this land after it had been enfranchised by the Inam Deputy Collector, and that, consequently, Madras Act III of 1895 does not apply. It is quite true that if the land had been enfranchised at the time of the contract, it would have been transferred without offending against Madras Act III of 1895, but when the parties entered into the contract, there was no certainty that the land would be enfranchised, or even if so enfranchised, that it would be enfranchised in the name of the contracting party. He was no doubt expecting that it would be so done and agreed to transfer his interest in the property when the event had taken place. This cannot be said to be more than a transfer of his expectation and as such would offend against S. 6 of the Transfer of Property Act, and so the agreement would be void as held in *Sri Jagannadha Rajuv.Sri Raja Prasada Rao* (1), a case which was quoted with approval by the Privy Council in *Ananda Mohan Roy* v. *Gour Mohan Mullick* (2). On this point I think it is perfectly clear that the contract is not enforceable.

It is argued, as far as I understand the agreement, that because the would-be vendor was in physical possession of the

1. (1915) I L R 39 M 554 : 28 M L J 650.
2. (1923) L R 50 I A 239 : 45 M L J 617 (P C).

Auryaprabhakara Rau v. Gummudu Sanyasi.

property and was merely subject to the disability to alienate, that that would make a difference to the case and that it must be deemed that such physical possession of one form of estate must be deemed to go some way towards possession of a different form of estate and, therefore, it is not a mere *spes successionis* that is being transferred, but rather a hope that one estate would be transformed into another estate. This appears to be equally a mere expectation and the mere fact that there is physical possession cannot affect the question at all. On this point I think the Subordinate Judge is right and that the contract is void and unenforceable.

The next contention is that under S. 65 of the Indian Contract Act, the plaintiff is entitled to the refund of the money advanced by him. If he had brought his suit within time, he would no doubt be entitled to the amount from the 1st defendant who received it. The period of limitation for such a suit is three years from the date when the contract is discovered to be void and as pointed out by the Privy Council in *Ananda Mohan Roy* v. *Gour Mohan Mullick* (2), ordinarily the time from which limitation would start is from the date of the agreement in the absence of special circumstances. The contract is one forbidden by law, and the appellants must be deemed to have been aware of the fact when they entered into it. It was therefore void from that date and appellants must be deemed to know that fact. If that is not the case, there is no allegation as to when they became aware of it. It is suggested that the plaintiffs were unaware of the illegality of the contract until the Subordinate Judge gave his decision in the suit. If that is so, the cause of action would only arise on the determination of that suit but assuming that to be so—I have no reason to think that it is—the cause of action would be based on the result of the suit and relief could not be claimed in the suit itself. His claim for refund of money must be disallowed, and the second appeal is dismissed with costs of the 1st and 2nd respondents. Second Appeal No. 1470 of 1922 follows this decision and is dismissed with costs.

T. S. V. *Appeals dismissed.*

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2. (1923) L R 50 I A 239 : 45 M L J 617 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

Guntuku Appanna (deceased) and another ... *Petitioners in both** (*1st appellant, proposed legal representatives of the 2nd appellant and legal representative of the deceased 1st appellant in Appeal No.* 355 *of* 1917 *on the file of the High Court*)

v.

Jallepalli Gavarappadu, minor, by mother and guardian Simmanna... *Respondents in both* (*Respondents Nos.* 2, 5 *to* 7, 10 *to* 13 *and legal representatives of the deceased* 9*th and* 1*st respondents and the proposed legal representative of the deceased* 3*rd respondent in do.*).

Appanna *v.* Gavarappadu.

Civil Procedure Code, O. 41, *R.* 4—*Appellants' undivided brothers—Joint Hindu family—Death of one prior to hearing—Fact not known to Court or counsel—Decree passed in favour of appellants—Effect of—Legal representatives of deceased appellant—Rights of.*

One of two brothers, who were undivided and members of a joint Hindu family, died before the hearing of the appeal. This fact was not known to the Court or the vakils arguing the case and on the appeal succeeding, a decree was passed in favour of both the appellants. When the case went back to the Original Court for the passing of a final decree, an application was put in by the legal representatives of the deceased appellant to have themselves impleaded. *Held,* the fact that one of the brothers was dead cannot put his legal representatives in a worse position than if he had not been a party to the appeal at all ; and assuming he was not a party, under O. 41, R. 4, the decree given in favour of the other undivided brother would enure for the benefit of all the members of the family. The legal representatives were therefore entitled to be impleaded. *Chintaman* v. *Gangabhai,* I L R 27 Bom 284 followed.

Petition praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue an order amending the cause title of the decree of the High Court in Appeal No. 355 of 1917 preferred against the decree of the District Court of Vizagapatam in Original Suit No. 7 of 1915 (Original Suit No. 55 of 1914 on the file of the Court of the Subordinate Judge of Vizagapatam) by inserting the names of petitioners 2 to 4 herein, *viz.*, Guntuku

*C M P Nos. 100 and 99 of 1924. 11th December, 1924.

Appanna v. Gavarappadu.

Butchi Venkata Surapadu, Guntuku Simhadri Appadu and Guntuku Jagannadha Appadu, being the legal representatives of the deceased 2nd appellant as appellants Nos. 3 to 5 and also by inserting the name of the 11th respondent herein, *viz.*, Jallepalli Venkayya, being the legal representative of the deceased 3rd respondent as the 14th respondent in the said Appeal No. 355 of 1917.

P. Somasundaram for petitioners.

B. Jagannadha Doss for respondent.

The Court made the following

ORDER *in Civil Miscellaneous Petition No.* 100 *of* 1924 :—This is an application to amend the cause title of the decree in Appeal No. 355 of 1917. This appeal was unfortunately heard and determined a few days after the death of the 2nd appellant therein ; the fact of this death was not known to the Court or to the vakils arguing the case. The appeal succeeded and a decree was passed in favour of both the appellants. Subsequently when an application was made to pass a final decree in the Original Court, an application was also put in to implead the 2nd appellant's legal representatives. It is suggested for the respondent that that application was out of time, even if the 2nd appellant had been alive on the date of the decree, and on that ground they should not have been brought on record. This is not a question which we have to decide here as that application is not before us ; but it appears that this is a case where the delay in bringing on record the legal representatives should be excused ; and we do not think that it is a ground for disallowing the present application. The fact that the 2nd appellant was dead on the date of hearing of the appeal cannot put his legal representatives in a worse position than if he had not been a party to the appeal at all ; and assuming that he was not a party to the appeal, the decree which was given in favour of his undivided brother, the 1st appellant would enure for the benefit of the other members of the family, namely, these petitioners who now wish to be added. In O. 41, R. 4 it is laid down, " Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be."

On this principle we consider that the decree passed legally in favour of 1st appellant must enure for the benefit of all the members of the appellants' family, and as they now wish to be formally brought on record as legal representatives of the deceased 2nd appellant who was not a party when the appeal was heard, we think that this should be allowed ; and we may refer to a similar case in *Chintaman* v. *Gangabhai* (1), where the same order was passed.

Appanna v. Gavarappadu.

We are also asked to implead the legal representatives of the 3rd respondent who had also died on the date of hearing. They do not appear to oppose this petition and consequently it may be taken that they assent to its being done.

We accordingly order the petition with costs against the contesting respondents.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Appaswami Chettiar ... *Petitioner* (Petitioner—Claimant)*

v.

N. Balakrishna Pillai and others .... *Respondents (Respondents* 1, 2 *and* 4—*Plaintiff and Defendants* 2 *and* 3).

Appaswami Chettiar v. Balakrishna Pillai.

Civil Procedure Code, O. 21, R. 58 and S. 115—Claim petition—Dismissal of—Absence of bona fides—*Question of possession not gone into—Interference in revision.*

Where a claim petition under O. 21, R. 58, Civil Procedure Code, was dismissed on the ground that the Court was not satisfied "with the *bona fide* of the claim or of the sale in his favour" the order is wrong and can be set aside in revision. In cases coming under O. 21, R. 58, the Court is bound to decide the question of possession. 28 M L J 327 ; 24 I C 62 followed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the City Civil Judge, Madras, in C. M. P. No. 846 of 1924 in E. P. R. No. 281 of 1924 in S. C. S. No. 6974 of 1922 on the file of the Court of Small Causes, Madras.

P. G. Krishna Aiyar for petitioner.

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*C R P No. 646 of 1924. 30th January, 1925.

1. (1903) I L R 27 B 284.

Appaswami Chettiar v. Balakrishna Pillai.

Muhammad Ibrahim and *K. Ramakrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—I am asked in this Civil Revision Petition to set aside an order by which the learned City Civil Judge has disallowed a claim under O. 21, R. 61 of the Civil Procedure Code. The decree-holder, in execution of the decree in Suit No. 6974 of 1922 on the file of the Court of Small Causes, Madras, attached house and ground No. 2|50 in Swami Pandaram Street, Chintadripet, Madras, along with other properties, as properties belonging to the judgment-debtor. The claimant, who is the petitioner before me, filed objections to the attachment under O. 21, R. 58 on the ground that he was in possession of the above house and ground, that it had been duly conveyed to him by its owners and that he had been in possession of it in his own right ever since the sale. The learned City Civil Court Judge, holding that " he was not satisfied with the *bona fides* of his claim or of the sale in his favour," dismissed his petition.

I think the order of the learned Judge is wrong and must be set aside. In cases coming under O. 21, R. 58, it has been held that the Court is bound to decide the question of possession and that, if a case is disposed of without deciding such question, the High Court ought to interfere under S. 115 of the Civil Procedure Code. [See *Rangammal* v. *Sevugan Chetti* (1)]. In this case, it is clear from the order that the learned Judge did not pay any attention to the question as regards the actual possession of the house. In this connection, the following observations of the learned Judges of the Calcutta High Court in *Satkari Mandal* v. *Thirtha Narain Bhattacharjee* (2) may be usefully referred to :—" The Court cannot found its decision on the question of the validity of the claim or the determination of the title to the property attached ....The Court below has thus refused to determine the one question it was competent to decide, namely, the question of possession, and has, on the other hand, determined the question it was not competent to investigate, namely, the question of title." As the learned Judge has failed to consider the question of possession which he is bound to decide under the Code, I would set aside the order of the learned Judge and direct him to restore the petition to his file and

1. (1914) 28 M L J 327. 2. (1913) 24 I C 62.

dispose of it according to law in the light of the above observations. The petitioner will get his costs here and in the Court below.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Yerlagadda Venkanna ... *Petitioner** (*Accused*)

Yerlagadda Venkanna, *In re.*

Abkari Act, S. 55 (b)—Penal Code, S. 188 (2)—Sale of arrack in accused's shop in contravention of order of District Collector and of terms of his license—Conviction for, under S. 55 (b) of Abkari Act and S. 188 of Penal Code—Validity—Conditions—Procedure to be followed in such case—No report by Abkari Inspector—Effect.

Petitioner was discovered by a Police Officer on a certain day selling arrack in his shop during a festival day at 6-10 P. M., 7-30 P. M. and 10-30 P.M., the former sales being in contravention of an order promulgated by the District Collector, and the latter sale being in contravention of the terms of his license. The petitioner was convicted under S. 188, Indian Penal Code, for the former sales and under S. 55 (*b*) of the Abkari Act for the latter.

On a revision petition filed against the said convictions, *held* that the conviction under S. 188, Indian Penal Code, was unsustainable because there was no question or proof of causing or tending to cause obstruction, annoyance or injury to any one, and it did not follow as a matter of course that selling drinks would lead to riots or disturbance.

As regards the conviction under S. 55 of the Abkari Act, *held* that it was not bad because there was no report by an Abkari Inspector on which the Magistrate could take cognizance of the offence.

The Abkari Act is not self-contained in the matter of the procedure for the investigation of offences under S. 55. In such a case the criminal procedure to be followed is that laid down under that Code. The offence having been committed in accused's shop would fall under S. 31 and not under S. 34 of the Abkari Act, and the police would have authority to send him direct before a Magistrate. The case is one to which S. 190 (1) (*b*) of the Criminal Procedure Code will apply. Further the original case investigated in the present case included in addition to an offence under the Abkari Act an offence under the Penal Code—a non-cognizable offence. In such a case the Police Officer would probably be correct in taking up the more serious offence as the principal offence, that is, the one in which he could arrest without a warrant, namely, S. 55 of the Abkari Act and he will probably be correct in following the provisions of that Act, so far as it can be done, rather than of the Criminal Procedure Code ; and, if he can follow the provisions of both by ensuring that the accused should appear before the Magistrate it is obviously his duty to do so.

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*Cr. R. C. No. 515 of 1924. 12th December, 1924.
(Cr. R. P. No. 426 of 1924.)

Yerlagadda Venkanna, *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Guntur Division in Criminal Appeal No. 28 of 1924 preferred against the judgment of the Court of the Sub-divisional Magistrate of Guntur in C. C. No. 70 of 1924.

P. Viswanatha Aiyar for petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The petitioner has been convicted of having committed offences under S. 188 (2) of the Indian Penal Code and S. 55 (*b*) of the Abkari Act.

The facts found were that he was discovered by a Police Officer on 20th March, 1924 selling arrack in his shop during a festival day at Mangalagiri at 6-10 P. M., 7-30 P. M and 10-30 P. M., the former sales being in contravention of an order promulgated by the District Collector, and the latter sale being in contravention of the terms of his license. The conviction under S. 188, Indian Penal Code, was for the former sales and that under S. 55 (*b*) of the Abkari Act for the latter.

It is contended for the petitioner first that S. 188, Indian Penal Code, will not apply to such a case : and we think this is so. There is here no question or proof of causing or tending to cause obstruction, annoyance or injury to any one, and it does not follow, as the Lower Courts seem to think, as a matter of course, that selling drinks will lead to riots or disturbance. We are of opinion that the conviction under S. 188, Indian Penal Code, will not stand.

The next point raised is that the conviction under S. 55 of the Abkari Act cannot stand because there is no report by an Abkari Inspector on which the Magistrate could take cognizance of the offence. The Public Prosecutor contends that the Magistrate is empowered in law to take cognizance of such an offence on the report of a Police Officer and without any report by an Abkari Inspector. We have been taken through several sections of the Act in this connection and the more we examine these the more difficult it is to extract what the Legislature intended to lay down as the proper procedure. The section which normally gives jurisdiction to a Magistrate to try an offence under S. 55 is S. 50, which certainly implies that where the offender is in custody or has given bail for his

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appearance, the Magistrate must wait for the report of an Abkari Inspector : and so far, this is in the petitioner's favour. The Public Prosecutor contends, however, that there are sections which imply that a Police Officer has power to arrest an offender under S. 55, admit him to bail and send him direct to the Magistrate without the intervention of the Abkari Inspector at all, and this must imply that the Magistrate must act under the Criminal Procedure Code and take cognizance of such an offence under S. 190 of that Act on a Police report. S. 31 of the Abkari Act empowers a Police Officer to arrest any one found by him on search in any place and believed to be guilty of an offence under the Act, and to admit him to bail for his appearance, before a Magistrate or an Abkari Inspector, "as the case may be" what this last phrase is intended to mean is obscure. S. 34 empowers a Police Officer to arrest any one found committing an offence punishable under S. 55 and to admit him to bail to appear before an Abkari Officer having jurisdiction to inquire into the case. It is notable that the word 'Magistrate' is not included in this section although it appears in S. 31. The Public Prosecutor contends that the omission is accidental, but we cannot supply in any statute words which are not there. The procedure begun under S. 34 seems to contemplate, in the case of a person arrested by the Police for committing an offence under S. 55, that the person be admitted to bail to appear before an Abkari Officer having jurisdiction to inquire into the case and presumably also that information of the offence be forwarded, as S. 38 would imply. If bail is not forthcoming or is not accepted by the Police Officer, he is bound under S. 40 to forward the offender to an Abkari Inspector if there be one within 10 miles, or to the Police Station ; and, if he is sent to the Police Station, the Police Station House Officer shall admit him to bail for his appearance before the Abkari Officer as aforesaid meaning apparently an Abkari Inspector appointed under S. 4 (*d*) of the Act or send him in custody to him. Then the Abkari Officer has to hold an enquiry and forward the case to the Magistrate for trial.

So far is fairly plain. But under S. 41 the Police Station House Officer apparently has an option of not bailing an arrested offender to appear before an Abkari Officer, but of bailing him to appear before a Magistrate and the same cryptic phrase as in the proviso to S. 31 "as the case may be"

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appears. This section by force of the terms of S. 40 would seem to apply such a procedure even to the case of persons referred to in S. 34, that is, "found committing an offence under S. 55 in any public thoroughfare or open place other than a dwelling house," although under S. 34 itself the officer who arrests is not given the power to send the offender "before a Magistrate, as the case may be" in S. 41 only to cases of arrest under S. 31, under which the offender may be sent before a Magistrate.

The net result seems to be this, that an offender arrested under S. 31 may be bailed to appear before either a Magistrate or an Abkari Inspector, while one arrested under S. 34 can be sent only before an Abkari Officer. If the offender is sent under either section before an Abkari Officer, there is an enquiry under S. 40 (3) and the offender is sent under S. 50 with a report to the Magistrate for trial. But there is nothing in the Act to indicate what is the procedure to be followed when the offender is sent under S. 31 direct to a Magistrate.

A still more serious lacuna in the procedure prescribed is that there is no provision at all for a case where the offender is not placed under arrest. The only section providing for a preliminary enquiry before trial is S. 40, and that applies only to cases of offenders brought—custody or bailed after arrest to appear before the officer holding the enquiry. The Abkari Act is thus not self-contained in the matter of the procedure for the investigation of offences under S. 55. In such a case the criminal procedure to be followed is laid down in S. 5 (2) of the Criminal Procedure Code to be under that Code. Now in the case before us, so far as we have the records before us, it does not appear that the accused was ever arrested or bailed out before the trial began. In any case the offence having been committed in accused's shop would fall under S. 31 and not under S. 34, and the police would have authority to send him direct before a Magistrate. It is therefore a case to which S. 190 (1) (*b*) of the Criminal Procedure Code will apply. We cannot therefore hold that in this case there has been any error in procedure or lack of jurisdiction. We have been referred to a reported case of this Court in *Kuppuswami Naidu, In re* (1) but the report does not make it clear whether that was a case initiated under S. 31 or 34 of the Abkari Act or whether the accused was arrested at the

1. (1922) 44 M L J 231.

Yerlagadda Venkanna, *In re.*

time of committing the offence. We have looked into the printed papers of that case, but they throw no further light on the matter. We are unable therefore to regard this ruling as necessarily applicable to the present case. A close examination of the provisions of the Abkari Act reveals as we have shown, that the Act is not self-contained in the matter of procedure, and that we must fall back on the Criminal Procedure Code to fill up the blanks in the procedure prescribed by the Abkari Act.

The present case is complicated by the fact that the original case investigated included in addition to an offence under the Abkari Act an offence under the Indian Penal Code—a non-cognizable offence. In such a case the Police Officer would probably be correct in taking up the more serious offence as the principal offence, that is, the one in which he could arrest without a warrant, namely, S. 55 of the Abkari Act, and he will probably be correct in following the provisions of that Act, so far as it can be done, rather than of the Criminal Procedure Code; and, if he can follow the provisions of both by ensuring that the accused should appear before the Magistrate it is obviously his duty to do so. The same procedure would be the proper procedure for a Police Officer to adopt when he is confronted with an offender whose offences are both under S. 55 of the Abkari Act and a cognizable offence under the Indian Penal Code.

We are therefore not prepared to interfere with the conviction under S. 55 of the Abkari Act ; but as the conviction under S. 188, Indian Penal Code, fails, the sentence will have to be reduced and we reduce it to the period of imprisonment already undergone, namely 20 days, while maintaining the fine imposed. The bail bond will be cancelled.

A. S. V. *Sentence reduced ; Bail bond cancelled.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD SUMNER, LORD WRENBURY, AND LORD CARSON.

Hurnandrai Fulchand ... *Plaintiff*

v.

Pragdas Budhsen ... *Defendant.*

Ex parte Pragdas Budhsen ... *Petitioner.*

P. C.
——
Hurnandrai Fulchand
v.
Pragdas Budhsen.
Pragdas Budhsen,
Ex parte.

Privy Council—Practice—Interpretation to be put upon an Order in Council—When made.

Generally speaking it is no part of the functions of the Judicial Committee of the Privy Council to interpret Orders in Council which have been already made unless they are brought before them in the ordinary way upon appeal. But under special circumstances, such as when the Board remitted an appeal to the Courts in India for the ascertainment of damages, without specifying whether fresh evidence was to be let in and the Indian Court feeling a doubt on the matter directed the parties to ascertain the intention of the Board, the Judicial Committee would entertain a petition for that purpose and give its opinion. *Ex parte Yarlagadda Durga,* (1903) L R 31 I A 64 followed.

Petition by the respondent to an appeal from the High Court at Bombay for directions as to the intention and effect of an Order in Council made on January 29, 1923, in the said appeal.

S. L. Porter for petitioner.

Clauson K. C. and *E. B. Raikes* for respondent.

4th December, 1924. The Judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER :—In accordance with the authority of the case of *Ex parte Yarlagadda Durga* (1) which has been cited to their Lordships, their Lordships are willing under the particular circumstances of this case to assist the High Court in Bombay by an expression of their opinion upon the question, which appears to have been mooted before them. They desire, however, to add that it is no part of the functions of their Lordships' Board, generally speaking, to interpret Orders in Council which have been already made unless they are brought before them in the ordinary way upon appeal. The present Board, of course, is only able to state the intention of the opinion delivered by them, and of the Order in Council that His Majesty was then pleased to pass thereupon, by reading the language of the opinion and of the Order, and those

1. (1903) L R 31 I A 64.

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Pragdas Budhsen, *Ex parte.*

Lord Sumner.

of their Lordships who were parties to the judgment would hesitate to claim any specific recollection of the facts of the case.

It does not appear to their Lordships that it was contemplated or could have been contemplated at that time, upon a question which was essentially one merely of calculating the amount of damages, that either party to a commercial dispute in Bombay would have proposed to call evidence long afterwards to contradict evidence which had been allowed to pass at the trial, when the facts were comparatively recent. This consideration and an admission of human frailty must be the Board's excuse for having failed to state more explicitly in the opinion that was arrived at what course they anticipated would be pursued in the Court of the trial Judge. They may perhaps be allowed to say that they fail to see what substantial doubt could have arisen upon the question. The course which the trial Judge had taken, the mode in which he assessed the damages, and his decision—whatever the grounds may be that he gave for it—not to admit any fresh evidence of the value of the goods, appear to their Lordships to have been in entire accordance with what the Board contemplated would be done upon the question, which it was necessary to remit to the Indian Court because their Lordships were not the proper tribunal to make calculations, and the parties were unable to come to an agreement.

In the result therefore the answer to the petition is unfavourable to the petitioners and they will have to pay the costs of the petition.

Solicitors for appellant : *T. L. Wilson and Co.*

Solicitors for respondent (Petitioner) : *E. F Turner and Sons.*

Petition dismissed.

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD SHAW, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

P. C.

Tilakdhari Singh v. Maharaja Kesho Prasad Singh.

Tilakdhari Singh and others ... *Appellants**

v.

Maharaja Kesho Prasad Singh ... *Respondent.*

Civil Procedure Code, S. 110—Concurrent findings of fact by Indian Courts —Right of appeal to Privy Council—Questions of law on which findings pro-

*P C Appeal No. 91 of 1923. 30th January, 1925.

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Tilakdhari Singh v. Maharaja Kesho Prasad Singh.

ceeded—Added alluvial land—Examination of documents of title to identify property conveyed thereby—Evidence Act (I of 1872), S. 92.

In an action for a declaration that certain alluvial accretions formed part of settled land, antecedent documents are admissible, under proviso (6) to S. 92 of the Evidence Act (I of 1872), for the purpose of identifying the property demised by the Settlement, but not for contradicting its terms.

Both the Subordinate Judge and the High Court in India having arrived at the same finding as to the area of the settled land, and there being no other question of law save that above-mentioned as to the admissibility of documents of title antecedent to the Settlement, *held,* that no appeal lay therefrom under S. 110 of the Civil Procedure Code, 1908, to the Privy Council.

If it appears that underlying findings in fact there are questions of law on which the findings proceeded or that there is a case that the Judges misdirected themselves, then the rule as to concurrent findings not being the subject of appeal does not apply.

Appeal from a judgment and decree (8th December, 1919) of the High Court (confirmed the 11th May, 1920, on an application for review), which affirmed a judgment and decree (22nd January, 1916) of the Subordinate Judge of Arrah.

The defendants (appellants) are Zamindars of Mouza Sheopur Diar. In 1862, the Collector of Ballia measured the alluvial increments formed by the action of the Ganges, and forming them into a separate estate called "Arazi Naubarar, Mouza Sheopur Diar," settled it with the defendants' predecessors-in-interest. In 1903, the defendants failing to pay the Government revenue on this added estate, it was sold by auction, and purchased by Maharani Beni Prasad Kuar (widow of the Maharaja of Dumraon) on whose death in 1907, the plaintiff (respondent) succeeded to the Dumraon Raj. In October, 1911, the plaintiff filed this suit in the Court of the Subordinate Judge of Arrah for declaration of his title to, and possession of, the added estate, claiming that its area was 2877 bighas. The defendants contended that the area of the "Arazi Naubarar" which was settled with their predecessors in 1862, and in 1903 auctioned for default in payment of Government revenue, was not more than 569 bighas, 12 cottahs.

Both the Subordinate Judge (M. Zahur, Esq.) and the High Court (Das and Foster, JJ.) upon appeal on the 8th December, 1919, and upon an application for revision on the 11th May, 1920, decreed the plaintiff's claim for the area specified in his plaint. The defendants appealed to His Majesty in Council.

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Sir George Lowndes, K. C. and *G. D. MacNair* for appellants.

L. de Gruyther, K. C. and *J. M. Parikh* for respondent.

L. de Gruyther, K. C. took the preliminary objection that the High Court having affirmed the decree of the Subordinate Judge, and there being no "substantial question of law" involved in the appeal, the High Court had erred in certifying that the case "fulfils the requirements of S. 110 of the Civil Procedure Code, 1908."

Sir George Lowndes, K. C. :—In addition to the question of fact, there is a substantial question of law as to (*i*) the proper construction of the Settlement proceedings and the grant to the defendants' predecessors, dated 13th June, 1862; and (*ii*) the admissibility of antecedent documents in evidence, whereon the Lower Courts have based their findings of fact.

30th January, 1925. The Judgment of the Board was delivered by

Lord Shaw.

LORD SHAW :—This is an appeal from a decree of the High Court at Patna which affirmed a decree of the Subordinate Judge of Arrah. The question involved in the appeal relates to the extent or area of a mahal called Naubarar.

The judgments below, in so far as they are judgments of fact, were concurrent judgments, and Mr. de Gruyther very properly, on behalf of the respondent, intimated that he would object to the competency of the appeal on that ground.

Their Lordships allowed the case to be opened, and it has been opened with great clearness and fullness by Sir George Lowndes. He has explained the point bearing upon what is the true nature of the deliverance pronounced by the High Court and the Court below, and he has maintained that, notwithstanding an apparent concurrence in findings of fact, there still remains as after explained a case which can legitimately be brought, as matter of law, under the well-known Indian practice, before their Lordships.

Their Lordships, before entering upon the merits of the question, desire to express their satisfaction with the judgment of the High Court as expressed by Mr. Justice Das in the High Court, which, for fullness of statement, for clear articulation of the points in issue, could not be excelled.

Their Lordships note from that judgment exactly what was the nature of the duty which the learned Judges considered

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to be cast upon themselves in the construction of the title which is in issue in this case.

It is to be further noted that not only are there two concurrent judgments, but there was also an application for review, and a third judgment was pronounced thereon confirmatory of the preceding judgments.

If it appears that underlying findings in fact there are questions of law on which the findings proceeded or that there is a case that the Judges misdirected themselves, then the rule as to concurrent findings not being the subject of appeal does not apply—to the exclusion of such grounds of law as are alluded to.

It is important to see whether any case has emerged of this character. It is accordingly necessary to quote the following passage, which covers the question as to the ambit of their duty as they considered it in the construction of the title to this landed estate :—

"I took the view," says the learned Judge, "that in order to understand what was actually settled" (that is to say the extent of the land actually contained within the title as such) "it was necessary to deal with certain documents on which the settlement was based, not to contradict any of the terms of the settlement, but to identify the thing demised. I considered all these documents" (and then he names them) "and came to the conclusion that what was actually demised was the tract of land bounded on the north by the plot No. 920 as shown in the Kistwar map of 1840, which formed the southern boundary of Gangabarar. As regards the southern boundary, there is no dispute that it consists of certain villages mentioned in the plaint."

It was not disputed in the argument before their Lordships that what had been scrupulously in view of the Judges, according to their statement, was a correct appreciation of the limits and functions of a Court in construing a document of title submitted for its consideration. The learned Judges properly said that it was not the duty of the Court, and would have been contrary to their duty, to admit any antecedent documents for the purpose of contradicting the terms of the settlement made. What they had to do was what the learned Judge says they did, use any antecedent documents and maps solely for the purpose of identifying the thing demised.

In their Lordships' opinion there is no ground for the suggestion that the Judges of the Courts below failed in this duty or introduced illegitimate considerations into their view upon the titles and the facts. They having done that which was strictly their duty, their Lordships are of opinion that what

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remained was a question of fact, and upon that question of fact the following is the finding as expressed by Mr. Justice Das :—

"I find no good reason for holding that the lands comprised in the settlement of 1862 were not, and much in the antecedent documents starting from Ex. U and ending with Exs. 91, 32 and 33 to indicate that they were, well defined and well ascertained, bounded on the north by the black line of 1851 which corresponds with the southern boundary of plot No. 920 in the Kistwar map of 1840, and on the south by the plaintiff's villages mentioned in the plaint;"

and in a further passage of his judgment the same learned Judge declared :—

"On a consideration of all the evidence in the case, I am clearly of opinion that the plaintiff has proved that the entire block of land bounded on the north by the southern boundary of plot No. 920 in the Kistwar map of 1840 or the black line in the map of 1851 and on the south by the plaintiff's villages mentioned in the plaint was settled as Sheopur Diar Naubarar with the predecessors-in-title of the defendants."

It is admitted—it must of course be admitted—that that entire block so taken is not limited by any measure as descriptive of the block. It must be further admitted that, upon the antecedent documents thus legitimately taken into view, that entire block, subject to the matter of the boundaries mentioned, was settled as the new mahal of Naubarar.

In those circumstances their Lordships are of opinion that the point as to competency is well taken and that this appeal is incompetent.

A point was mentioned with regard to the revenue assessable from the neighbouring mahal of Gangbarar by the revenue authority. Their Lordships enter in no way whatsoever upon that matter and make no pronouncement which would be either limitative or regulative of the rights of parties with regard to revenue proceedings. Such a point is not before their Lordships.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed on the ground of incompetency and to allow against the appellants to the respondent the costs of these proceedings.

Solicitors for appellants : *Watkins and Hunter.*

Solicitor for respondent : *E. Dalgado.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Kumara Goundan ... *Appellant* (3rd Defendant—Appellant)*

v.

Thevaraya Reddi and others ... *Respondents (Supplemental Plaintiffs 2 to 4 and Defendants 1 and 4 to 6).*

Kumara Goundan *v.* Thevaraya Reddi.

Civil Procedure Code of 1908—*O.* 21, *R.* 58—*Claim—Order dismissing—Construction—Dismissal on ground of delay or dismissal on ground that suit is inevitable—Dismissal on latter ground—Suit under O.* 21, *R.* 63—*Necessity—Limitation—Attachment in execution—Dismissal of execution petition for default—Effect on attachment—Claim—Order disallowing—Suit under O.* 21, *R.* 63 *to set aside—Necessity—Attachment to get rid of which claim was made—Cesser of—Effect.*

Where the order disallowing a claim stated : "The contest is practically between the two claimants and a suit is inevitable. On the ground that the claims have been preferred too late and the delay is not satisfactorily explained, I disallow the claim." *Quaere* : Whether the order could be construed as one dismissing the petition on the ground of delay. *Held* that, if the order could not be so construed, the decision of the Full Bench in *Venkataratnam* v. *Ranganayakamma,* I L R 41 M 985 would not apply, and the claimant would not be precluded, in a suit brought by the purchaser at the sale held in execution of the decree, from raising the question of title.

Where the final order on an execution petition was that it was dismissed, *held* that, whatever the effect of the order might be as between the decree-holder and the judgment-debtor, persons who were not parties to the execution proceedings were entitled to rely upon the fact that the petition was dismissed on account of the unwillingness of the decree-holder to proceed with the execution petition.

Where an execution petition is dismissed, the attachment effected in pursuance of the petition ceases.

Where a claim preferred to an attachment made in execution of a decree was disallowed, but the execution petition in pursuance of which the attachment was made was subsequently dismissed because the decree-holder was unwilling to proceed with the execution petition and the attachment itself therefore ceased to subsist, *held,* that the claimant was not bound to institute a suit under O. 21, R. 63, Civil Procedure Code, to set aside the claim order and was not precluded from raising the question of title in a suit brought against him in respect of the attached property on the ground that he did not file such a suit.

Second Appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 5 of 1921 preferred against the decree of the Court of the District Munsif of Namakkal in Original Suit No. 254 of 1918.

*S. A. No. 247 of 1922. 8th December, 1924.

Kumara Goundan v. Thevaraya Reddi.

T. M. Krishnaswami Aiyar for appellant.

C. Krishnamachariar for 3rd respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—The facts of this case are as follows : In this case one Ramanadhan Chetty had obtained a decree against defendants 1 and 2 in S. C. S. No.296 of 1915. In execution of that decree (E. P. No. 959 of 1915) the decree-holder attached the suit property. The order to attach was made on 11th August, 1915 and the attachment was actually made on 6th September, 1915. The sale was posted to 8th January, 1916. On 6th January, 1916 the present 3rd defendant filed a claim petition. On 8th January, 1916, the sale was adjourned to 15th January, 1916, in order to enable the Court to enquire into the claim. But the claim petition was actually disallowed only on 17th January, 1916. The order disallowing the claim petition runs as follows : "In these two cases rival claimants have preferred claims to the property in dispute. The judgment-debtors are minors and two persons purporting to be their guardians have sold in one case the whole property and in another half the property to the two purchasers respectively who are adjacent land owners. The contest is practically between the two claimants and a suit is inevitable. On the grounds that the claims have been preferred too late and the delay is not satisfactorily explained, I disallowed the claim." Seeing that the attachment was made on the 6th September, 1915 and the claim petition was filed on 6th January, 1916 it is difficult to believe that there was such a serious delay in the case as to justify a dismissal without enquiry. It is doubtful that the District Munsif really meant to dismiss the claim petition on the ground of delay in view of his remark "The contest is practically between two rival claimants and a suit is inevitable." He seemed to think that whatever his order was, a regular suit was so certain that to enquire into the merits at that stage would be a waste of time and it was desirable to avoid waste of time at that stage. It is, therefore, difficult to construe the District Munsif's judgment as one dismissing the petition on the ground of delay in spite of the express statement to that effect. If the judgment of the District Munsif cannot be regarded as one disposing of the claim petition on the ground of delay then the Full Bench decision in *Venkataratnam* v. *Ranganaya-*

Kumara Goundan v. Thevaraya Reddi.

Ramesam, J.

kamma (1) does not apply; and the issue which raises the question of title will have to be gone into. But I do not wish to rest my judgment in this case solely on this ground in view of the ambiguous nature of the District Munsif's order. Mr. Krishnaswami Aiyar has contended that E. P. No. 959 of 1915 was dismissed and with its dismissal the attachment has ceased to exist under R. 57 of O. 21, Civil Procedure Code. The E. P. No. 959 of 1915 with all orders thereon up to 1st February has now been exhibited in Second Appeal as Ex. A. E. P. No. 196 of 1916 is exhibited as Ex. B. What happened was that on 17th January, 1916, after the claim petition was disallowed the decree-holder requested the Court to stop the sale. At any rate that is the note made on the execution petition. Mr. Krishnamachari who appears for the respondent now suggests that that was not the result of the unwillingness on the part of the decree-holder to proceed with the sale but it was at the suggestion of the District Munsif that he stated he would file another petition and was willing to withdraw the same. He relies on E. P. No. 196 of 1916 which was filed on the 31st January, 1916, and on which an order was made directing notice for fresh proclamation. This was ordered on 21st February, 1916. In that petition, the petitioner stated that the Court suggested that another petition may be filed on 1st February. No doubt the facts are somewhat suspicious and support Mr. Krishnamachariar's suggestion. But the first petition was not very old at the time and there does not seem to be any particular reason why the District Munsif should be anxious to have it taken out of the file for statistical purposes being only five months old and suggest to the party to file another petition. If the District Munsif did so for such purposes no doubt it is improper. The decree-holder seemed to be willing to oblige the District Munsif. Anyhow he was willing that the fact should appear as if he was not prepared to proceed with the E. P. No. 959 of 1915 on 17th January, 1916. The final order in E. P. No. 959 of 1915 on the 1st February was that the petition was dismissed. Whatever the effect of that order was between the decree-holder and the judgment-debtor, persons who are not parties to the execution proceedings and who do not know all that passed between the Court and the decree-holder are entitled to rely on the fact that the petition was dismissed on

1. (1918) I L R 41 M 985 : 35 M L J 335 (F B).

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Ramesam, J.

account of the unwillingness of the decree-holder to proceed with E. P. No. 959 of 1915. The result of this was that the attachment ceased to exist under O. 21, R. 57. Though a fresh order on E. P. No. 196 of 1916 was taken without a fresh attachment and is final and binding between the decree-holder and the judgment-debtor and cannot be questioned on account of want of attachment, the present 3rd defendant is entitled to rely on the result of the dismissal of the earlier petition and say that the attachment has ceased to exist so far as he is concerned.

If the attachment has ceased to exist the next question that arises is whether the order on the claim petition, dated 17th January, compels the 3rd defendant to set it aside within one year and precludes him from raising his title in the absence of his suit within one year. On this question it is convenient if I make an extract from my judgment in A. S. No. 36 of 1920 referring this identical point to the Full Bench.

The appellant next contends that the order of 8th August, 1916, has not got to be set aside because the attachment to get rid of which, the claim petition was filed, had ceased to exist.

I will first observe that the effect of an order on a claim petition may be different according as the judgment-debtor is or is not a party to the inquiry. It was pointed out in *Moidin Kutti* v. *Kunhi Kutti Ali* (2) that the judgment-debtor may not be a party to the inquiry on the claim petition and in such a case the order though in favour of the claimant and opposed to the judgment-debtor's rights need not be conclusive against the judgment-debtor if no suit is filed by him within one year to set it aside. Conversely, if adverse to the claimant and in favour of the judgment-debtor it need not be set aside by the claimant to the full extent it may sound in favour of the judgment-debtor and has to be set aside only so far as the order is in favour of the decree-holder concerned. If the judgment-debtor is a party, then the order on the claim petition decides not only questions between the claimant and the decree-holder, but also questions between the claimant and the judgment-debtor, the latter being in general much broader in scope than the former. To put it in other words : as soon as a claim petition is filed, there are three possible parties to the inquiry—the claimant, the decree-holder and the judgment-debtor and we may have two classes of cases :—(1) Cases in

2. (1902) I L R 25 M 721 : 12 M L J 411.

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which all three are parties. In such a case an order against the claimant will be wider in scope and has effects reaching much farther than in the second class. (2). Cases in which the claimant and the decree-holder are the only parties. In this case the order is narrower in scope and its consequences are not so far-reaching as in class (1).

An example will make my meaning clear. *A* obtains a decree against *B* for Rs. 200 and attaches a house worth Rs. 3,500. *C* claims ownership of the house and objects to the attachment. If *A, B* and *C* are parties to the inquiry and the claim petition is dismissed, it is obvious that the effect of the order is to hold that *C* is not the owner of the house and *B* is the owner, the order in favour of *B* operating to help *A* and other creditors of *B*. A regular suit by *C* in such a case to set aside the order to the fullest extent has to be valued at Rs. 3,500 and has to be filed in a Court competent to try that suit.

But if only *A* and *C* are parties to the inquiry, the effect of the dismissal of *C's* petition is simply to hold that *A* has got a right to pursue the attachment and *C* has not got a right to object to the attachment. It is not to decide that *C* is not the owner of the property and that *B* is. A regular suit to set aside the order should be valued at Rs. 200 and not at Rs. 3,500 and may be filed in the District Munsif's Court. It may be that the *reason* of the order is that *C* is not the owner and it may be that, in the regular suit that follows, the issue that may be framed relates to the title of *C* (especially so if *B* is a party to the suit). These remarks follow from *Krishnaswami Naidu* v. *Somasundaram Chettiar* (3), *Sadaya Pillai* v. *Amurthathachy* (4) and *Vedalingam Pillai* v. *Veerathal* (5). I will refer to these cases later on again, but at present I have made these general remarks as it is useful to remember the distinction in the discussion of cases.

The earliest case on the point raised before us is *Umesh Chunder Roy* v. *Raj Bullubh Sen* (6). At page 281, Tottenham, J. says :—"The finding of the Court in the execution department that the sale was invalid only meant

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3. (1907) I L R 30 M 335 : 17 M L J 95 (F B).
4. (1910) I L R 34 M 533.
5. (1919) 37 M L J 547.
6. (1882) I L R 8 C 279

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that the sale was invalid as against the judgment-creditor, and as against any purchaser who might purchase at a sale held in execution following *that attachment.*" In view of the latter clause, I do not see what meaning can be obtained by laying special emphasis on the words "against the judgment-creditor." It may be that the reason of the order on the claim petition in that case was that the sale was made during attachment (*see* S. 64 of the present Code) but I do not see what argument can be derived from this fact unless the order on the claim petition which held that "the sale was invalid" expressly limited the operation of the order to claim petitions objecting to the particular attachment and saved other claim petitions to other possible attachments. The fact remains that the claim was dismissed with a general opinion that the sale was invalid without any limitation on the effect of the opinion.

The next case is *Ibrahimbai* v. *Kabulabai* (7). Birdwood, J. said: "The second attachment was a new and distinct act giving a new cause of action on which the plaintiff is entitled to a fresh enquiry and decision." This was followed in *Gopal Purshotam* v. *Bai Divali* (8) in which Sargent, C. J. says "*when that attachment* was removed by the judgment-creditor's own act on 20th November, 1888, there was no longer an attachment or any other proceedings, etc." In *Krishna Prasad Roy* v. *Bipin Behari Roy* (9) their Lordships say at page 231: "The object of the claim preferred by the plaintiff under S. 278, Civil Procedure Code, was to obtain the removal *of the attachment,* and when *that attachment* had been removed after payment of the decretal amount there was no longer an attachment or any proceeding in execution on which the order could operate to the prejudice of the plaintiff, and therefore there was no necessity to bring a suit to set aside the order We are unable to accept the view suggested on behalf of the appellants that, in spite of the withdrawal of *the attachment,* the dismissal of the claim under S. 281, Civil Procedure Code, could, by virtue of the provisions of S. 283, Civil Procedure Code, have the effect of finally determining the question of title between the parties."

7. (1888) I L R 13 B 72. 8. (1893) I L R 18 B 241.
9. (1903) I L R 31 C 228.

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The next case is *Koyyana Chittemma* v. *Doosy Gavaramma* (10). It does not appear clearly from the facts whether the judgment-debtor was a party to the claim proceedings though, on the whole, it looks as he was not. The order on the claim petition was held conclusive against the claimant as between and a subsequent vendor from the judgment-debtor. I am indebted to my learned brother (Spencer, J.) for the suggestion that this case can be justified on the ground that the subsequent vendor paid off the amount of the decree in execution of which the claim was preferred and may therefore be regarded as having been subrogated to the rights of the execution-creditor. This was not the actual ground of the judgment which seems to proceed on a too literal reading of S. 283. The learned Judges distinguish the cases in *Umesh Chunder Roy* v. *Raj Bullubh Sen* (6) *Ibrahimbai* v. *Kabulabai* (7), *Gopal Purshotam* v. *Bai Divali* (8) and *Krishna Prasad Roy* v. *Bipin Behari Roy* (9) on the ground that in all these cases, the raising of the first attachment was within a year of the order on the claim proceedings. I find it difficult to follow this ground of distinction. In the first place, if it is conceded that the order becomes useless and inoperative when the attachment ceased within one year of the order, this is a concession not allowed by the literal reading of the section. Secondly, if the operativeness of an order on a claim petition is to be regarded as conditional on the continuance of the attachment, it is difficult to see why the cession of the attachment within one year should destroy the operativeness and the cessation of it beyond one year should have just the opposite effect merely because a suit to set aside could not be brought more than one year after the date of the order. It seems to me a novel legal conception. Thirdly, the fact that the decrees were paid off within one year seems to be an accident. Not one of the eight Judges laid any emphasis on the fact. The only difference I can see between the two cases (the raising of the attachment within one year and its raising beyond one year) is that in the former case, the unsuccessful claimant who waits incurs no risk as he knows for certain within one year that the attachment in exe-

6. (1882) I L R 8 C 279.

7. (1888) I L R 13 B 72. 8. (1893) I L R 18 B 241.

9. (1903) I L R 31 C 128.

10. (1905) I L R 29 M 225 : 16 M L J 136.

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cution of it has ceased to exist and in the latter he takes a risk by not suing as he cannot be certain that the attachment will be raised. But I do not see why when the event, on which he takes his chance, *viz.*, the cessation of the attachment by the payment of the decree or for other reason, happens, he should not take advantage of it simply because he took risks in so waiting. This distinction has not been approved by Seshagiri Aiyar, J., in *Vedalingam Pillai* v. *Veerathal* (5) and the decision in *Chittemma* v. *Doosy Gavaramma* (10) must be regarded as unsound except on the ground that the judgment-debtor must be regarded as a party to the order on the claim proceedings. This is how it was treated in all cases in which it was cited with reference to this point in *Krishnaswami Naidu* v. *Somasundaram Chettiar* (3) and *Ponaka Balarami Reddi* v. *Hazi Mahomed Abdul* (11). In my opinion, after these cases, it is futile to rely on *Koyyana Chittemma* v. *Doosy Gavaramma* (10) as an authority of any value.

Another distinction has been suggested by the respondents in respect of the cases in *Umesh Chunder Roy* v. *Raj Bullubh Sen* (6), *Ibrahimbai* v. *Kabulabai* (7), *Gopal Purshotam* v. *Bai Divali* (8) and *Krishna Prasad Roy* v. *Bipin Behari Roy* (9). It is said that the question of the conclusiveness of the order arose in a proceeding unconnected with the decree in the execution of which the claim was preferred. In *Umesh Chunder Roy* v. *Raj Bullubh Sen* (6) and *Ibrahimbai* v. *Kabulabai* (7) the point arose in connection with the execution of a second decree though in *Umesh Chunder Roy* v. *Raj Bullubh Sen* (6) it was a second decree based on the same right as the first. In *Gopal Purshotam* v. *Bai Divali* (8) and *Krishna Prasad Roy* v. *Bipin Behari Roy* (9), the question arose in later suits unconnected with the decree though in the former the party opposed to the unsuccessful claimant was the successful decree-holder claiming in some other right. The contention amounts to this, *viz.*, the order is conclusive against the claimant in so far as he seeks to resist the particular decree though the attachments may be different but not conclusive as against different decrees

3. (1907) I L R 30 M 335 : 17 M L J 95 (F B).
5. (1919) 37 M L J 547.
6. (1882) I L R 8 C 279.
7. (1888) I L R 13 B 72.
8. (1893) I L R 18 B 241.
9. (1903) I L R 31 C 228.
10. (1905) I L R 29 M 225 :16 M L J 136.
11. (1914) 26 M L J 409.

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though of the same decree-holder and *a fortiori* of different decree-holders. The distinction no doubt helps the respondents in the present case but is opposed to the decision in *Gollampalli Subbayya* v. *Shankara Venkataratnam* (12). Incidentally I may observe this distinction concedes that the decisions in *Koyyana Chittemma* v. *Doosy Gavaramma* (10) and in *Singariah Chetti* v. *Chinnabbi* (13) are erroneous and that the language of O. 21, R. 63 should not be taken too literally. I think the distinction in so far as it seeks to apply the conclusiveness of an order to different attachments in execution of the same decree is opposed to the principle of *Krishnaswami Naidu* v. *Somasundaram Chettiar* (3) the reasoning in which equally applies to a case where there is a decree for costs to the extent of Rs. 200 and for mesne profits of the value of Rs. 3,500 and the first attachment was for costs only and the latter attachment is for the mesne profits. I also observe that the emphasis in all the four cases is on the non-identity of the attachments and not of the decree as the words underlined by me in the quotations from those judgments show.

If the language of O. 21, R. 63 is read literally it may apply not only—

(*a*) to claimants resisting rights worked out in pursuance of the attachment to which the claim is made (in my opinion the operation of the rule ought to be confined to this class) but also to

(*b*) (1) between the claimant and other attachments under the same decree ;

(2) between the claimant and attachments under other decrees of the same decree-holder ;

(3) between the claimant and the decree-holder, whatever the right be on which he relies ;

(4) between the claimant and all other decree-holders of the same judgment-debtor and all other persons claiming rights against the same judgment-debtor such as mere creditors who have not obtained decrees ;

(5) between the claimant and judgment-debtor (including his assignees) ;

3. (1907) I L R 30 M 335 : 17 M L J 95 (F B).
10. (1905) I L R 29 M 225 : 16 M L J 136.
12. (1917) M W N 851. 13. (1920) I L R 44 M 268 : 40 M L J 7.

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(6) between the claimant and all persons (even if unconnected with the judgment-debtor) interest in denying the title of the claimant. [See *Vedalingam Pillai* v. *Veerathal* (5)].

To allow the extension of the section so as to apply to class (6) is to create a species of orders *in rem* which are unknown except in Probate and Matrimonial proceedings. Even the doctrine of *res judicata* does not apply so as to bar a person *A* from urging his right against *C* by reason of a former adjudication (adverse to *A*) between *A* and *B*. [Justice Holloway points out in *Sri Rajah Kakarlapudi Suryanarayanaraju Garu* v. *Chellamkuri Chellamma* (14) that such a plea is allowed in Continental jurisprudence].

To allow the extension to class (5) is to ignore the distinction between the cases where a judgment-debtor is a party and where he is not which I pointed out at the beginning of the judgment.

To allow the extension to class (4) is to imagine that mere simple creditors and money decree-holders have got some interest in the property of their debtors and judgment-debtors though there is no charge on the property and not even attachment of it.

To allow the extension to classes (2) and (3) is to imagine that a person *A*, by merely obtaining a decree against *B* and attaching *B's* property under it has got a right to predicate that *B* is the owner of the property and not *C* for the purpose of all possible decrees he may obtain against *B* and all other purposes in respect of which he may come into conflict with *C*—a right unknown to law.

To allow the extension to class (1) is inconsistent with *Krishnaswami Naidu* v. *Somasundaram Chettiar* (3) and ignores the possibility of a decree being paid up by the judgment-debtor, or of an attachment being raised.

My view is supported by the two Bombay decisions and the two Calcutta decisions I have already mentioned by *Ponaka Balarami Reddi* v. *Hazi Mahomed Abdul* (11) (though the point was not necessary for the decision) by *Gollampalli Subbayya* v. *Shankara Venkataratnam* (12) (a very strong case on the facts) and by *Manilal Girdhar* v. *Nathdlal Mahasukhram* (15). Ignoring *Koyyana Chit-*

3. (1907) I L R 30 M 335 : 17 M L J 95 (F B).
5. (1919) 37 M L J 547 at 549.
11. (1914) 26 M L J 499.
12. (1917) M W N 851.
14 (1870) 5 M H C R 176.
15. (1920) I L R 45 B 561.

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temma v. *Doosy Gavaramma* (10) the only decision in favour of the appellants is *Singariah Chetti* v. *Chinnabbi* (13). I have already commented on this in *Lakshmi Ammal* v. *Kadiresan Chettiar* (16) and one of the decisions I have referred to in this judgment except *Gollampalli Subbayya* v. *Shankara Venkataratnam* (12) has been cited in it. It was based on a decision in *Ramaswami Chetti* v. *Alagiri Chetti* (17) in which the only question decided was whether the suit abated by reason of the satisfaction of the decree. The Code provides for no abatement except on death. Their Lordships held that the suit did not abate. I do not think it is permissible to infer from this that the order on the claim inquiry continues operative after the cessation of the attachment in a case where no suit was filed. I think the filing of the suit makes all the difference. The decisions in *Ponnuswami Pillai* v. *Samu Ammal* (18), *Lakshmanan Chettiar* v. *Parasivan Pillai* (19) and *Velu Padayachi* v. *Arumugam Pillai* (20) do not help us as they are plain examples of the application of O. 21, R. 63 without the complications of the cessation of the first attachment. I think the decisions in *Singariah Chetti* v. *Chinnabbi* (13) and *Gollampalli Subbayya* v. *Shankara Venkataratnam* (12) are irreconcilable. Some reliance has been placed on the language of S. 64 of the Code. When we remember that S. 64 and O. 21, Rr. 58—62 used to be in the same chapter of the former Codes, S. 64 supports my view and shows that the object of the Legislature in providing against obstacles and objections to an attachment is the protection of rights created in pursuance of the attachment only."

The view I there took was that an order on a claim petition is final against the claimant in so far as the rights worked out in pursuance of the particular attachment are concerned. The only thing that I would now add in addition to the reasons given there is that O. 21, R. 58 runs :—"Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, etc." The language of the rule, especially the words "such attachment"

10. (1905) I L R 29 M 225 : 16 M L J 136.
12. (1917) M W N 851.
13. (1920) I L R 44 M 268 : 40 M L J 7.
16. (1921) 41 M L J 198.
17. 27 I C 800
18. (1916) 31 M L J 247
19. (1919) 37 M L J 159.
20. (1919) 38 M L J 397.

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I think, supports my reasoning in the passage quoted above. Seeing that there are a number of decisions of this High Court taking this view, namely, *Ponaka Balarami Reddi* v. *Hazi Mahomed Abdul* (11), *Gollampalli Subbayya* v. *Shankara Venkataratnam* (12) and *Sadaya Pillai* v. *Amurthathachy* (4) inasmuch as my learned brother agrees with my view, I do not think it is necessary to refer this case to the Full Bench solely on account of the decision in *Singariah* v. *Chinnabbi* (13). The second appeal will, therefore, be allowed and the suit remanded for fresh disposal as regards 3rd defendant. The appellant will have a refund of the Court-fees paid in this Court and in the Lower Appellate Court. Costs in the first appeal and second appeal will be paid by the appellant as he has not raised the point about the cesser of attachment by filing the two execution petitions which have not been exhibited. Costs in the Court of first instance to abide the result.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—I agree and have nothing to add.

A. S. V. —— *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT :—VISCOUNT FINLAY, LORD ATKINSON, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

Venkatadri Appa Rao and others ... *Appellants**

v.

Parthasarathi Appa Rao and others ... *Respondents.*

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Venkatadri Appa Rao *v.* Parthasarathi Appa Rao,

Limitation Act, 1908, *Art.* 123 *to Sch. I—"When legacy or share becomes payable or deliverable"—Hindu Law—Widow—Right to possession of deceaesd Hindu owner's estate—His widow's will bequeathing income, etc., of her interest therein—Alleged adoption of their son into another family—Suit by widow for possession and declaration of invalidity of adoption—Her death pending suit without having received income from husband's estate—Rules for interpretation of wills.*

Venkataramayya Appa Rao (who died about 1890) and his wife, Venkayyamma, had one son, Narayya, whom Papamma in December 1890 went through a ceremony of adopting. Narayya died on the 4th August, 1895. Disputes then arose between Venkayyamma and Papamma as to the right to possession of the Medur estate, which was vested in him at the time of his death, and in October 1895, Venkayyamma instituted a suit (No. 35 of 1895 in the Court of the Subordinate Judge, Ellore) against Papamma, claiming a declaration

*P C Appeal No. 25 of 1924. 30th January, 1925.

4. (1910) I L R 34 M 533. 11. (1914) 26 M L J 499.

12 (1917) M W N 851.

13. (1920) I L R 44 M 268 : 40 M L J 7.

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that Papamma's alleged adoption of Narayya was invalid, and possession of Medur with all its savings, appurtenances, etc. While the suit was pending, in March, 1899, Venkayyamma died, bequeathing by paras. 5 and 6 of her will certain promissory notes, cash, etc. belonging to Medur and the interest thereon, in specified shares to her two brothers. In her place, Venkata Narasimha and Rangayya, the two surviving paternal uncles of Narayya, and nearest reversioners to the Medur estate, were brought on the record. On the 2nd December, 1899, the Subordinate Judge, Ellore, dismissed the suit; the plaintiffs appealed and a new party thereto was added, *viz.*, Parthasarathi, cousin of Narayya's natural father, whose claim to a one-third share in Medur in Suit No. 44 of 1899 before the District Judge, Godavari, was subsequently in December 1903 dismissed, and who also in consequence appealed therefrom. On the 20th November, 1905, the High Court heard all these appeals together, allowed that of Parthasarathi in Suit No. 44 of 1899, and dismissed that of Venkata Narasimha and Rangayya in Suit No. 35 of 1895. These latter then appealed to the Privy Council, but died before the hearing, and their sons were then brought on the record as appellants. In December 1913, the Privy Council decided that Narayya's adoption by Papamma was invalid, that Venkayyamma was entitled for her life to the net income of Medur from the date of Narayya's death, and that upon Venkayyamma's death, Venkata Narasimha and Rangayya became entitled as reversionary heirs to Medur, which, upon their death, devolved with its lands, profits, etc., to their sons in equal moieties. Owing to the disputes and litigation aforesaid, Venkayyamma had never received the income of Medur, and it therefore became part of her estate after her death. In actions instituted in 1916 by the legatees under her will for payment out of their respective legacies, *held*, that (*i*) Venkayyamma had full power to dispose by her will of the promissory notes, cash, and income of Medur accruing, but remaining undrawn by reason of the pendency of Suit No. 35 of 1895 during her life, as she was entitled to a life-interest in her deceased husband's estate, and her will was to be construed as referring to income from the property allocated to her by the final decision and determination of that suit; and (*ii*) the words "payable" and "deliverable" in Art. 123 of the First Schedule to the Limitation Act, 1908, are to be interpreted with reference to the time when the administrator or executor of a deceased person's estate has the share or legacy actually in his hands enabling him to make it over to the beneficiary, and consequently if, at the time when the will bequeathing such money or legacy is executed, the acquisition of the estate or of the moneys belonging thereto is deferred or is dependent upon the event of litigation then pending directly referring to the property, time does not begin to run against the legatees for enforcing their claims until the date when such pending litigation is finally determined by decree.

Basso Kuar v. *Dhum Singh*, L R 15 I A 211; *Lord* v. *Lord*, 2 Ch A 788; *Roddy* v. *Fitzgerald*, 6 H L C 876; and *Gordon* v. *Gordon*, L R 5 E & I A 284 referred to.

Consolidated appeal from a judgment and three decrees (4th April, 1922) of the High Court in Letters Patent Appeals Nos. 20, 24 and 25 of 1921, reversing three decrees and the prevailing judgment of Sadasiva Aiyar, J., dated the 22nd April, 1921 of a Division Bench of the same Court, which

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affirmed three decrees and a judgment (29th November, 1917) of the Subordinate Judge, Bezwada, in Suit Nos. 30, 87 88 of 1916.

The material facts are fully set out in the judgment of their Lordships.

The Judgment appealed from is reported in 43 M L J 486.

A. M. Dunne, K. C., S. Swaminathan, B. Dube and *K. V. L. Narasimham* for appellants.

L. de Gruyther, K. C., A. H. Clauson, K. C., J. M. Parikh and *P. Chenchiah* for respondents.

30th January, 1925. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE.—These are consolidated appeals from three decrees, dated the 4th April, 1922, of the High Court at Madras, which had reversed three decrees, dated the 22nd April, 1921, of a Division Bench of that Court, by which three decrees, dated the 29th November, 1917, of the Subordinate Judge of Bezwada dismissing original suits numbered 30, 87 and 88 of 1916 had been affirmed. The suits had been instituted in the Court of the Subordinate Judge of Bezwada on the following dates : No. 30 of 1916 on the 26th April, 1916; No. 87 of 1916 on the 6th December, 1916 ; and No. 88 of 1916 on the 9th December, 1916. It was agreed at the hearing of these appeals that in drawing up the decree of the High Court in O. S. No. 30 of 1916, L. P. A. No. 20 of 1921, that the words " mesne profits " in paragraph 3 of the decree should have been " income " and their Lordships amended that decree by substituting in it for the words " mesne profits " the word " income. " There was no question of mesne profits in the case.

In Suit No. 30 of 1916 Sri Rajah Parthasarathi Appa Rao Bahadur was the plaintiff, and Sri Rajah Venkatadri Appa Rao Bahadur, Sri Rajah Venkataramayya Appa Rao Bahadur and Sri Rajah Sobhanadri Appa Rao Bahadur and the Court of Wards were defendants. By an order of the Court of the 6th December, 1916, the Court of Wards was discharged from being a defendant, and the second defendant was appointed guardian of the third defendant, who was a minor. The suit was to recover a legacy of Rs. 80,000 bequeathed by Venkayyamma, a widow, by her will of the 30th January, 1899, to her sister-in-law Inuganti Kasturammah, a legacy of Rs. 40,000 bequeathed by the same will to another

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sister-in-law Inuganti Venkataramanayyamma, and shares of the residue of the testatrix's property which she had bequeathed to her brothers Chinna Rao and Buchi Thammayya. The plaintiff was the assignee of all the above-mentioned legacies, and he claimed them as such assignee. He also claimed interest on those legacies, and other relief.

In Suit No. 87 of 1916, Sri Damera Venkata Rajagopala Seet Rayyamma Rao was the plaintiff, and Sri Rajah Meka Venkatadri Appa Rao Bahadur Garu, Sri Rajah Meka Venkataramayya Appa Rao Garu, and Sri Rajah Sobhanadri Appa Rao Bahadur Garu, by his brother and guardian the second defendant, were the defendants. The plaintiff claimed to recover a legacy of Rs. 40,000 bequeathed to him by the same Venkayyamma by her will, with interest thereon, and other relief.

In Suit No. 88 of 1916, Lakkaraju Bapayya was the plaintiff, and the defendants were the persons who were the defendants in Suit No. 30 of 1916 and in Suit No. 87 of 1916. The plaint in the suit was filed under S. 26 of the Code of Civil Procedure, 1908, and under O. 1, R. 8, and O. 7, R. 1 of that Code. The plaintiff claimed to recover Rs. 2,000 bequeathed to him by Venkayyamma by her will and interest thereon and a decree, and that for such purposes necessary accounts should be taken and that the property of the testatrix should be administered by the Court, and prayed for other relief.

When it may be necessary later in the judgment to refer to any of the parties to this litigation, they will be referred to by their names without any descriptive addition.

Except the Court of Wards, all the original defendants and the representatives of those who died who have been brought on the record, were nearly related to each other and to Venkataramayya Appa Rao, of whom Venkayyamma was the widow.

To understand how these suits arose and the positions of the parties to them, it is necessary to refer briefly to a litigation which began on the 21st October, 1895, and to some other facts.

The suits in which these consolidated appeals have arisen were instituted in 1916 in the Court of the Subordinate Judge of Bezwada to obtain payment of legacies which Venkayyamma, a Hindu widow, had bequeathed by her will of the

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30th January, 1899. She died on the 9th March, 1899. The due execution of the will is admitted, but the suits have been contested by the defendants on several grounds, of which those which are now in the least material are that the testatrix left no property out of which the legacies could be paid ; that the will has been incorrectly construed by the High Court at Madras ; that the suits or one of them is barred by a previous suit which was brought in 1902 ; and that the suits were not brought within time. In order to understand those contentions it is necessary to refer at some length to a somewhat complicated history.

Venkayyamma, the testatrix, was the widow of Venkataramayya Appa Rao, who had died before 1890. They had one child, a son, Narayya Appa Rao, who died on the 4th August, 1895, while he was a minor. He died unmarried and had not made a will. When he died he was the last male owner of the Medur estate. The Court of Wards had taken charge of the Medur estate during his minority and continued to be in charge of it until December, 1895, when a Receiver, appointed by a Civil Court, having jurisdiction, took possession of it. The estate of Medur continued to be in charge of Receivers, duly appointed, until after 1902. The Receivers acted as officers of the Civil Court, and it was their duty to bring and to defend suits affecting the estate, to collect the rents and profits of the estate, to render accounts to the Civil Courts, to invest balances of money which might be in their hands, and to pay moneys received by them into a local branch of the Bank of Madras after deducting necessary and legal expenses. The moneys paid into the Bank by the Receivers and the Government promissory notes and other securities in which moneys derived from the Medur estate were invested were under the control of the Civil Court for the benefit of those who might be entitled to them.

The Medur estate and the Nidadavole estate—with the latter these suits are not concerned—had formed parts of a large Zamindari in the Province of Madras, and the families respectively in which they were vested were nearly related. In December, 1890, Rani Papamma Rao, who was the childless widow of the last male owner of the Nidadavole estate, went through a ceremony of adopting Narayya Appa Rao as a son to her late husband. As will later be seen, it was held by the Board in 1913 that she had not power to

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make the adoption and that it was invalid. Until that decision of the Board in 1913 it seems to have been generally considered that the adoption was valid. Shortly after Narayya Appa Rao died in August, 1895, disputes arose between Rani Papamma Rao and Venkayyamma as to the right to the possession of the Medur estate. The former claimed a right to the possession as the mother by adoption of Narayya Appa Rao; the latter, alleging that the adoption was invalid, claimed a right to the possession as his natural mother. The Court of Wards in September or October, 1895, passed a resolution to hand over to Rani Papamma Rao the possession of the Medur estate unless restrained by an injunction of a competent Court before the 1st December, 1895, and, thereupon, Venkayyamma instituted on the 21st October, 1895, in the Court of the Subordinate Judge of Ellore a suit against Rani Papamma Rao and the Collector of the Kistna District, who was the local agent of the Court of Wards, in which she claimed a declaration that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and also claimed to be placed in possession of the Medur estate with all the savings, appurtenances, etc., of the estate. That suit was Suit No. 35 of 1895 in the Register of the Court at Ellore.

When Venkayyamma died on the 9th March, 1899, her suit, No. 35 of 1895, was still pending in the Court of the Subordinate Judge, and on the 1st May, 1899, on the application of Venkata Narasimha Appa Rao he and his brother Rangayya Appa Rao were brought on the record of Suit No. 35 of 1895 as plaintiffs as being the two surviving uncles of Narayya Appa Rao and the nearest legal reversioners to the Medur estate. The Subordinate Judge of Ellore on the 2nd December, 1899, made a decree dismissing the suit, and Venkata Narasimha Appa Rao and Rangayya Appa Rao separately appealed from that decree to the High Court at Madras. To those appeals, Parthasarathi Appa Rao, who was a cousin of Narayya Appa Rao's natural father and had claimed a third share in the Medur estate, was made a party. He had claimed that third share in a Suit No. 44 of 1899 in the Court of the District Judge of Godavari, in which his claim to a third share in the Medur estate was dismissed by a decree of that District Judge on the 12th December, 1903. From that decree of the District Judge of Godavari dismissing his claim to a third share Parthasarathi Appa Rao appealed to

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the High Court at Madras. The three appeals above mentioned were heard together by the High Court at Madras, and on the 20th November, 1905, the High Court by a decree dismissed the appeals of Venkata Narasimha Appa Rao and Rangayya Appa Rao, and allowed the claim of Parthasarathi Appa Rao to a third share in the Medur estate. From that decree of the 20th November, 1905, of the High Court at Madras Venkata Narasimha Appa Rao and Rangayya Appa Rao appealed to His Majesty in Council. Before the appeal came on for consideration by the Board, Rangayya Appa Rao and Venkata Narasimha Appa Rao had died, and Venkatadri Appa Rao, son of Rangayya Appa Rao, and Venkataramayya Appa Rao and Sobhanadri Appa Ro, sons of Venkata Narasimha Appa Rao, were brought on the record as the appellants.

On the 10th December, 1913, the Board reported to His Majesty, so far as is now material, that it ought to be declared that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and that on the death of Venkamma Rao (Venkayyamma) Rangayya Appa Rao and Venkata Narasimha Appa Rao became entitled as reversionary heirs to the Medur estate and the lands with mesne profits and moveable properties appertaining thereto and that the said estate with mesne profits and the moveable properties appertaining thereto ought to be divided into moieties between the appellants Venkatadri Appa Rao as to one such moiety and Venkataramayya Appa Rao and Sobhanadri Appa Rao, minors, as to the other moiety. His Majesty on the 19th December, 1913, having taken that report into consideration was pleased by and with the advice of His Privy Council to approve thereof and ordered that the same be punctually observed, obeyed and carried into execution.

It will be observed that the claim to a third share in the Medur estate which Parthasarathi Appa Rao had made was not allowed, and that the right of Rangayya Appa Rao and Venkata Narasimha Appa Rao to the possession of the Medur estate as reversionary heirs did not arise until Venkayyamma had died on the 9th March, 1899.

The result of the appeal to His Majesty in Council established the fact that Venkayyamma had a right to the income received from the Medur estate from the death of her son Narayya Appa Rao on the 4th August, 1895, until she died on 9th March, 1899, less the expenses of collecting it and

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less such expenses as were necessarily incurred in maintaining the Medur estate. That income included any interest which was paid or payable upon any Government promissory notes which the Court of Wards may have held in respect of moneys received from the Medur estate before the 4th August, 1895, and any interest paid or payable by banks in respect of such part or parts of her income which during her life the bank or banks had received on deposit or otherwise at interest. If Venkayyamma had actually received that income she might have added it to the Medur estate as an accretion, but she did not, and it remained at her absolute disposal by will or otherwise, and on her death it was part of her estate which was applicable for the payment of such legacies as she might bequeath by her will.

Owing to the disputes which have been referred to and to the necessary action taken by the Civil Court to protect the Medur estate for the benefit of whoever might be entitled to the possession of it, Venkayyamma never obtained actual possession of the income to which she was entitled, but her estate, which would be available for the payment of legacies bequeathed by her, consisted to a great extent of that income to which she had been entitled, and no one who was not her executor or an administrator of her estate appointed by a Court or a legatee under her will was entitled to receive what represented that estate or any part of it. After the death of Venkayyamma her estate consisted of the income to which at the time of her death she was entitled and to what represented that income which had been invested or deposited in the Government Treasury, or in a bank or banks, and of any interest which might become payable in respect of such investment as long as it remained under the control and custody of the Court. If the Court should hand over to any person not entitled to receive that estate or any part of it, such person would be liable to repay it to the person entitled to receive it with such interest in respect of it as it had made, or at least as it might have made if it had been deposited at interest with the Bank of Madras or any other similar Indian bank of position.

On the 30th January, 1899, Venkayyamma made her will which, so far as is material, was as follows :—

"Will executed on the 30th day of January, 1899, by Sri Rajah Venkata Rajagopala Venkayyamma Rao Bahadur Garu, widow of late Sri Rajah Venkataramayya Appa Rao Bahadur Zamindar Varu.

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I have been ill for about four months past and now there is much swelling and hard breathing, and therefore, being afraid that I will not survive, I, while in a sound state of consciousness and understanding make the following arrangements :—

1. Out of the jewels and other valuables belonging to me, I have already sold a major portion and spent that amount as well as the amount borrowed from my brother, Sri Rajah Inuganti Venkata Rajagopala Buchi Thammayya Bahadur Garu and from my younger brother, Chiranjivi Sri Rajah Inuganti Rajagopala Venkatarama Chinna Rao, for the expenses of the Medur estate suit and for our maintenance and other expenses.

2. Out of the minor jewels that are remaining with me at present, the jewels set with diamonds and pearls shall be divided into three shares, and out of those shares, one share shall be given to my elder brother Sri Rajah Inuganti Buchi Thammayya Garu and two shares to my younger brother Sri Rajah Chinna Rao.

3. Further, the remaining gold and silver jewels, utensils, etc., and also cattle, shall be given to my two brothers as specified in paragraph 2.

4. The two silver maces of chobdars and orderlies which belong to us shall be given to my junior brother-in-law Sri Rajah Venkata Narasimha Appa Rao Bahadur Garu.

5. The Government promissory notes and cash relating to the Medur estate which have been in the custody of Court till this day, as well as the interest accruing thereon till payment of the amount, shall be divided into four shares, and out of them, one share shall be given to my elder brother Buchi Thammayya Garu, and three shares to my younger brother Chinna Rao.

6. Out of the Government promissory notes and cash of the Medur estate which are remaining in deposit in Court and the jewels, etc., the amounts specified hereunder shall be first expended and only out of the remaining amount, one share shall, as stated in paragraph 5, be paid to my elder brother and three shares to my younger brother.

Particulars of the expenses to be incurred :—

	Rs.	A.	P.	
1.	80,000	0	0	Rupees eighty thousand only to my younger sister-in-law Inuganti Kasturammah.
2.	40,000	0	0	Rupees forty thousand to my elder sister-in-law Inuganti Venkataramanayyamma Garu.
3.	40,000	0	0	Rupees forty thousand to my younger sister Damera Venkatarajagopala Seethayyamma.
4.	12,000	0	0	Rupees twelve thousand to Inuganti Achayya Garu's son Venkatanarasimha Rao.
5.	12,000	0	0	Rupees twelve thousand to Inuganti Kondamma Garu's daughter Bangaramma.
6	1,000	0	0	Rupees one thousand to Inuganti Achayya Garu.
7	1,000	0	0	Rupees one thousand to Chelikani Narasimharayanim Garu's sons Suramma and Achayya.
8.	1,500	0	0	Rupees one thousand five hundred to the three daughters of Chelikani Narasimharayanim Garu.
9.	600	0	0	Rupees six hundred to Inuganti Papayya Garu's wife Venkamma Garu.

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Particulars of the expenses incurred :—

	Rs.	A.	P.	
10.	5,000	0	0	Rupees five thousand to our agent Jandhyala Venkatapurnayya Garu, who has been working on our behalf in our Medur estate suit with zeal and interest.
11.	3,000	0	0	Rupees three thousand to R. Sriramulu Sastrulu Garu, High Court Vakil.
12.	1,000	0	0	Rupees one thousand to Adapa Venkataswami.
13.	1,400	0	0	Rupees fourteen hundred to Venkataramanna.
14.	500	0	0	Rupees five hundred to Thirumalasetti Sobhanadri.
15.	800	0	0	Rupees eight hundred to Adapa Pentayya.
16.	800	0	0	Rupees eight hundred to Kundali Mangayya.
17.	500	0	0	Rupees five hundred to Adapa Rangam.
18.	500	0	0	Rupees five hundred to Ramakristi.
19.	200	0	0	Rupees two hundred to Patti Ramalakshmi.
20.	200	0	0	Rupees two hundred to Kandukuri Kotayya.
21.	200	0	0	Rupees two hundred to Chelikani China Lakshmadu.
22.	50	0	0	Rupees fifty to the second daughter of Adapa Venkataramanna.
23.	100	0	0	Rupees one hundred to Sesha—torn.
24.	2,000	0	0	Rupees two thousand to Lakkaraju Bapayya Garu.
25.	2,000	0	0	Rupees two thousand to Voppula Venkatachalam Pantulu Garu.
26.	100	0	0	Rupees one hundred to Sri Satyanarayanaswami Varu enshrined in Annavaram.
27.	1,000	0	0	Rupees one thousand for the daily *Bhogam* (offerings) of Sri Sitaramaswami Varu enshrined in Annavaram.

Saripalli Gopalakrishnamma Garu, an inhabitant of Rajahmundry, shall be the executor and give effect to the will as stated above, from after my death.

This will is executed with my full will.

(Sd.) SRI RAJAH VENKATA RAJAGOPALA VENKAYYAMMA RAO BAHADUR ZAMINDAR GARU."

Nine persons signed an attestation clause in which they stated that the will was signed by the testatrix as her will in their presence, who at the same time at her request in her presence and in the presence of each other signed their names as witnesses. The will having been executed was enclosed in a sealed cover which bore the following endorsement :—

"Will executed on the 30th January, 1899, by Sri Rajah Venkata Rajagopala Venkayyamma Rao Bahadur Zamindarini Garu of Sanivarapeta to be given effect to after her death."

The will was presented for deposit on the 2nd February, 1899, at the Office of the Registrar of Godavari by the agent whom the testatrix had appointed to deposit it at the Registry. After the testatrix had died the Registrar of Godavari, having satisfied himself that she had died, opened the sealed cover and registered the will. The sole executor

appointed by the will did not take upon himself the duties of an executor and died shortly after the testatrix.

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It was the will of a Hindu of the Province but not of the town of Madras, and had not been made by her within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature of Madras, and did not relate to immoveable property situate within the local limits of that original civil jurisdiction.

After the death of Venkayyamma, a Sub-Magistrate of Ellore took possession of certain jewellery and other things which had belonged to her as her stridhanam. He handed over the things to the police, who gave them into the possession of Rangayya Appa Rao and Venkata Narasimha Appa Rao, who had no title to them as reversioners or otherwise, and they took possession of them and claimed them as reversioners. Thereupon the two brothers of Venkayyamma, who are mentioned in the first and second clauses of her will, brought a suit on the 2nd March, 1902, in the District Court of Godavari against Rangayya Appa Rao and Venkata Narasimha Appa Rao for possession of that property. The first plaintiff in that suit having died, his son and heir was made a plaintiff. Finally a decree for possession of the property claimed was made in favour of the plaintiffs. It is necessary to refer to that suit as one of the contentions of the appellants in this appeal has been that the suit of 1902 having been brought these suits were not maintainable. That contention was founded on misconception. The causes of action were not the same. The suit of 1902 was for the wrongful conversion (trover, it used to be called in England) of goods. The present suits are to obtain payment of legacies, and there is no claim in respect of any of the goods to which the suit of 1902 related.

The other contentions of the appellants in this appeal were that, (*a*) Venkayyamma had no disposing power to bequeath the legacies ; (*b*) that clauses 5 and 6 of the will had been wrongly construed by the High Court ; and (*c*) that the suit was barred by the law of limitation.

As to the objection that Venkayyamma had no disposing power to bequeath the legacies, that question is involved in the contention that clauses 5 and 6 of the will have been wrongly construed by the High Court. Their Lordships will consider these two contentions together. On the death of

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her son Narayya Appa Rao on 4th August, 1895, she became entitled to the Medur estate and its income to hold for her own life, and that income included the interest on investments of all moneys received in respect of the Medur estate collected before the death of her son on the 4th August, 1895. To that income she remained entitled until her death on the 9th March, 1899. That income or any part of it she could, while she remained entitled to it, have added as an accretion to the Medur estate if she had wished to do so. There is no evidence to suggest that she had ever added any part of that income as an accretion to the Medur estate. She was consequently entitled to dispose of it by will or otherwise.

It has been contended on behalf of the appellants that the High Court in the decree of the 4th April, 1922 in Partha-sarathi Appa Rao's Letters Patent Appeal must have misconstrued cls. 5 and 6 of Venkayyamma's will as to those promissory notes in those clauses mentioned which represented moneys received by the Court of Wards before the 4th August, 1895, in Narayya Appa Rao's lifetime, and included them in the income of the Medur estate mentioned in the third paragraph, as amended by their Lordships, of that decree. There was no misconstruction of cls. 5 and 6 of the will. Venkayyamma was, after the death of her son on the 4th August, 1895, entitled to hold during her life as part of the Medur estate those promissory notes or other investments which represented moneys received by the Court of Wards in respect of the Medur estate so that she might receive for her own use and as part of her income such interest as might be payable under them, but by her will she did not bequeath these promissory notes which represented moneys which had been received by the Court of Wards before the 4th August, 1895, she only dealt with the promissory notes to which she was absolutely entitled as representing moneys which had been received after her son's death by the Court of Wards as the Receivers. That is the only reasonable construction of her will and the High Court in the decree of the 4th April, 1922, passed in Letters Patent Appeal No. 20 of 1921, was under no misconception of Venkayyamma's position or of her rights.

There remains to be considered the question of limitation. The Article of the First Schedule of the Indian Limitation Act, 1908, which applies to the suit in which these consolidated appeals have arisen is Art. 123, which allows twelve

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years, calculated from the time "when the legacy or share becomes payable or deliverable," for bringing a suit "for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate." The question as to what the word "payable" means is not without difficulty. It has been contended on the part of the appellants that the legacies sued for became payable at latest twelve months after the death of Venkayyamma, in which case the suits would be barred by limitation. Looking at Art. 123, as one of general application to such suits, it appears to their Lordships that a similar interpretation must be given to the words "payable" and "deliverable" as used in the Article, and that a share in the property of an intestate would not be "deliverable" until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, and, similarly, a legacy or share in a legacy does not become "payable" until the executor or other person liable to pay it has in his hands money with which it could be paid.

In the present case no one could have had in his possession or control any fund representing the income of the Medur estate, which Venkayyamma had had a right to enjoy for her own use but had not received, until it had been finally decided by the Board in 1913 that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and there was no other fund. It was suggested on behalf of the appellants that the plaintiffs in these suits might have brought suits for these legacies as soon as Venkayyamma had died or within twelve months after her death against her heir, whoever he might then have been, and might have obtained decrees against him for the payment of the legacies when he might be in possession of assets with which the legacies might have been payable. Without expressing any opinion as to whether such a suit could or could not have been maintained against a Hindu heir who had received no property belonging to Venkayyamma, their Lordships may quote a passage from the judgment of the Board in *Mussammat Basso Kuar* v. *Lala Dhum Singh* (1), as to the effect of Art. 97 of Act XV of 1877. The passage is as follows :—

"Barumal might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have been to have it suspended

1. (1888) L R 15 I A 211.

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or retained in Court till after the decision of the appeal in the specific performance suit. Dhum Singh's defence would have been that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not, and it would be a lamentable state of the law if it were found that a debtor, who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all."

In this case no difficulty of applying Art. 123 of the First Schedule of the Indian Limitation Act, 1908, arises when the will of Venkayyamma is considered. It was a carefully drawn will bequeathing legacies of, in the aggregate, a large sum of money. Venkayyamma had already when she made her will commenced her suit which would determine whether she was entitled to any fund out of which any legacies which she might bequeath could be paid. If the adoption of Narayya Appa Rao by Rani Papamma Rao should be finally held to have been valid, Venkayyamma and her advisors must have known that there was and would be no fund out of which the legacies could be paid. They could not be paid unless it should be finally decided that the adoption was invalid. She stated in her will that she had been very ill for four months and was afraid that she would not survive, and that she had sold the major part of her jewels and other valuables and had spent the amount (obtained by the sale of them) as well as the amount of money which she had borrowed from her two brothers, mentioned in her will, "for the expenses of the Medur estate suit and for our maintenance and other expenses," and in clause 5 directed that "the Government promissory notes and cash relating to the Medur estate, which have been in the custody of Court till this day, as well as the interest accruing thereon till payment of the amount, shall be divided" in the manner which she directed. And in cl. 6 she directed that "Out of the Government promissory notes and cash of the Medur estate which are remaining in deposit in Court and the jewels, etc., the amounts specified hereunder shall be first expended and only out of the remaining amount, one share shall, as stated in paragraph 5, be paid to my elder brother and three shares to my younger brother." And then she set out as expenses to be incurred a full and complete list of the legacies to be paid. The only conclusion which on these facts their Lordships can arrive at is that the testatrix intended that the

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legacies should be payable and be paid after the final determination of the suit which she had brought for a declaration that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid and to establish her right to the income of the Medur estate. That litigation was not finally determined until the judgment of the Board was delivered in 1913, and these suits were instituted in 1916 and were within the time allowed by Article 123 of the First Schedule to the Indian Limitation Act, 1908.

If any authority were necessary to show that the intention of a testatrix, when not expressly and unambiguously stated in her will, may be inferred by a Court from other facts stated or referred to in her will that legacies bequeathed by the will should not be paid until the conclusion of litigation in which she was engaged when she made her will, it may be deduced from the judgment of Lord Justice Turner, L. J. in *Lord* v. *Lord* (2).

In *Roddy* v. *Fitzgerald* (3), Lord Wensleydale, in referring to the rules for the construction of wills, said :

"These rules are perfectly plain and clear. The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator."

And then Lord Wensleydale referred to other rules to be followed by Courts in construing wills.

In *Gordon* v. *Gordon* (4), Lord Cairns, as to the construction of the wills, said :—

"I take the law on this subject to have been expressed with much accuracy and felicity by Lord Cranworth, than whom no Judge more consistently adhered to sound and strict principles of construction in the interpretation of wills. In the case of *Abbott* v. *Middleton* before this House, Lord Cranworth speaks thus : "Where, by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these

2. 2 Ch A 788. 3. 6 H of L 876. 4. L R 5 E & I A 284

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anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable."

The case of *Lord* v. *Lord* (2) was referred to by Sir W. S. Schwabe, C. J. and by Coutts Trotter and by Kumaraswami Sastri, JJ., in their learned judgments in the Letters Patent Appeals.

It appears from the judgments of the Subordinate Judge of Bezwada of the 29th November, 1917, and from the judgment of Kumaraswami Sastri, J., of the 4th April, 1922, that at different dates between 1903 and 1908 Rangayya Appa Rao, Venkata Narasimha Appa Rao and Parthasarathi Appa Rao each obtained on his own application to the High Court one-third of the amount standing to the credit of Suit No. 35 of 1895. They each gave some security. It also appears that after the order of His Majesty in Council of the 19th December, 1913, had been made Venkatadri Appa Rao, Venkataramayya Appa Rao and Sobhanadri Appa Rao obtained from Parthasarathi Appa Rao the one-third which he had received. For the amounts received by Rangayya Appa Rao and by Venkata Narasimha Appa Rao their sons, as their heirs and legal representatives, are responsible.

The decrees of the High Court from which these consolidated appeals have been brought, having been amended as to one of them by substituting "income" for the words "mesne profits" were the right decrees to make in the appeals under the Letters Patent, and their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitor for appellants : *H. S. L. Polak.*

Solicitors for respondents : *E. Dalgado, Barrow, Rogers and Nevill.*

A. de M. *Appeals dismissed.*

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2. 2 Ch A 788.

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Lahore.)

PRESENT :—VISCOUNT HALDANE, LORD DUNEDIN AND SIR JOHN EDGE.

Begu and others ... *Appellants**

v.

The King-Emperor ... *Respondent.*

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Begu *v.* King-Emperor.

Criminal law—Charge under one section, and conviction under another section, of the Penal Code (Act XLV of 1860)*—Criminal Procedure Code (Act V of* 1898), *Ss.* 236 *and* 237*—Joint trial—Mode of taking assessors' opinion under S.* 309*—Conditions necessary for appealing to Privy Council in criminal matters.*

Of the five appellants, jointly charged with murder under S. 302 of the Penal Code, and tried before the Sessions Judge and three assessors, the Judge came to the conclusion, upon the opinion, which he recorded, of the assessors that (*a*) the 2nd and 3rd appellants were present at the scene of the murder, and committed the deed, and therefore, convicted them under the said section, and sentenced them to death ; (*b*) it was doubtful if the 1st, 4th and 5th appellants were present at or participated in the murder, but convicted them, under S. 201 of the Penal Code, of causing evidence of the murder to disappear, and sentenced them to 7 years' rigorous imprisonment. Upon appeal it was contended that (*i*) the 1st, 4th and 5th appellants not having been charged under S. 201 of the Penal Code, on which they had been convicted, the whole trial in which they were jointly tried with the 2nd and 3rd appellants was bad ; (*ii*) the opinion of the assessors not having been taken orally in the manner prescribed by S. 309 of the Criminal Procedure Code (Act V of 1898), the trial was vitiated. *Held,* affirming the convictions and sentences, that Ss. 236 and 237 of the Criminal Procedure Code amply justified the trial and convictions under the two distinct sections of the Penal Code; and (*ii*) even apart from the Trial Judge's statement that the requirements of S. 309 of the Criminal Procedure Code had been duly observed, their non-observance was not shown to have led to any miscarriage of justice.

Dillet v. *The Queen,* 12 A C 459 referred to.

Appeal from the judgment of the High Court of Judicature at Lahore (8th April, 1924) upholding the judgment of the Sessions Judge of Montgomery (22nd Dec. 1923) convicting Walia and Bakhu, the 2nd and 3rd appellants, of the murder of Baksha at 10 P. M. on the 15th June, 1923, at Tibbi Hamid Sahu, under S. 302 of the Penal Code ; and convicting Begu, Raja and Hamid, the 1st, 4th and 5th appellants, of causing evidence of the commission of the murder to disappear with the intention of screening the offenders from legal punishment, under S. 201 of the Penal Code, and sentencing them to 7 years' rigorous imprisonment.

*P C Appeal No. 151 of 1924. 25th February, 1925.

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The facts of the case appear sufficiently set forth in the judgment of their Lordships. At the conclusion of the trial on the 7th December, 1923, the Sessions Judge recorded the opinion of the assessors :—

"The trial being now concluded, the assessors gave their opinion as follows :—

"The assessors were unanimously of opinion that Bakhu and Walia, accused, did together attack Baksha, with intent to kill him, and that they murdered him. That the allegations put forward by these two accused that the affair started out of a conversation about a turn of water, which led to a dispute, does not seem reliable. That it is uncertain as to whether Baksha, deceased, did or did not strike a blow at Walia, accused, with an axe, as alleged by Begu and Walia, accused. That the evidence of Turez (P. W. 8), the eye-witness, appears reliable. That the track-evidence of Hassu (P. W. 15), etc., is reliable.

"Further, that Begu and Raja, accused, were also present at, and took part in, the assault on Baksha, deceased, as stated by Turez, and that there may be some doubt as to whether Hamid, accused, was also present and taking part in the assault or not. And finally that the prosecution case and evidence appear generally reliable throughout."

Upon this the Sessions Judge on the 22nd December, 1923 delivered his considered judgment, holding Bakhu and Walia guilty of murder under S. 302 of the Penal Code, and sentencing them to death ; and holding Begu, Raja, and Hamid not guilty of murder, but guilty of the lesser offence under S. 201 of the Penal Code, and sentencing them to 7 years' rigorous imprisonment each. These findings and sentences were confirmed on appeal by the High Court of Judicature at Lahore on the 8th April, 1924. The appellants now appealed, by special leave, to His Majesty in Council.

W. Wallach for appellants. The convictions of Begu, Raja and Hamid under S. 201 of the Penal Code without a charge having been framed as required by Ss. 221 and 233, Criminal Procedure Code (V of 1898), without the accused having been afforded an opportunity of producing any defence to such charge and without the assessors' opinion having been taken as to the appellants' guilt under S. 201, Penal Code, is a violation of the provisions of Chap. XIX of the Criminal Procedure Code. Also the omission to take the assessors' opinion orally in the manner required by S. 309 of the Criminal Procedure Code is a grave contravention of the law. These violations of the Code are not mere irregularities, as the High Court considered, curable by the operation of S. 537, Criminal Procedure Code, but vitiate

the whole trial, and accordingly, the joint trial of the appellants offends against S. 233 of the said Code. It is submitted that S. 237 of that Code has no application to the present case, but only to cases mentioned in the next preceding section (S. 236) which this is not. Moreover, the procedure adopted by the Sessions Judge violates the fundamental principles of natural justice. Lastly, the evidence on the record does not justify in law a conviction under S. 201 of the Penal Code.

A. M. Dunne, K. C. and *K. Brown* for respondent (Secretary of State for India) were not called upon to reply.

25th February, 1925. The Judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE :—This is an appeal against a judgment of the High Court of Judicature at Lahore in a case which came before it on appeal from the Sessions Judge of Montgomery. By their judgment the High Court affirmed the sentence of death which had been pronounced by the Sessions Judge on two of the appellants and the sentence of seven years' rigorous imprisonment pronounced on the three other appellants.

Shortly stated the case made out by the prosecution was this. On the night of 15th June, 1923, one Baksha, the murdered man, was riding home accompanied by a man called Turez, who was the chief witness for the prosecution. The latter parted from him about 9 P. M. to go to a well in one of his fields, and Baksha continued on his way. Very shortly after they had parted Turez heard a cry from the direction in which Baksha had gone ; he ran forward and saw Baksha being assaulted by the five accused, and another man, who has since absconded. It was said in the evidence that friction had existed between the families of Baksha and the accused. Turez came sufficiently close to them to see what was happening. Two of the accused, seeing him, threatened him and went towards him ; but he ran away to the neighbouring village of Tibbi Hamid Sahu, where he raised an alarm and stated what he had seen. A party from the village at once went to the place where the assault had taken place, but they found no trace of Baksha; only signs of a struggle and blood on the ground. There was a certain amount of conflict of evidence. Turez said all the accused fell upon Baksha and inflicted on him many wounds with weapons which included a hatchet and other sharp weapons. It was afterwards found that when they

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had killed him they wrapped up his corpse in a cloth and placed it on a horse and went away with it. That is important in view of what took place at the trial. The horse was identified and trackers were able to trace the footprints of the accused, and the Court was satisfied that each of the appellants was identified.

The appellants were committed for trial at the Sessions Court on a charge of murder under S. 302 of the Indian Penal Code. The case was tried by the learned Judge at the Sessions Court with the aid of three assessors, and at the end of the case the assessors gave their opinions, which were recorded ; that they were unanimously of opinion that Bakhu and Walia, the accused, had attacked Baksha with intent to kill him; that they murdered him ; that two of the others who were present took part in the assault, as stated by Turez, the eye-witness ; that there might be some doubt as to whether Hamid, one of the accused, was also present and took part in the assault or not ; and, finally, that the prosecution case and evidence appeared generally reliable throughout. That is what the learned Judge regarded as being the opinion of the assessors. The learned Judge, having the evidence and the views of the assessors before him and having considered them, on the 22nd December delivered his judgment. With regard to Bakhu and Walia he decided that they intended to kill Baksha and were guilty of murder and he sentenced them to death. With regard to the other three, he was of opinion that the evidence did not sufficiently or definitely prove that they were present at and had taken part in the murder, but, on the other hand, he convicted each of them of having removed the body, and he sentenced them each to seven years' rigorous imprisonment.

From this judgment the appellants appealed to the High Court, and the appeal was heard by Mr. Justice Broadway and Mr. Justice Campbell, who dismissed the appeal.

A petition for special leave to appeal from this judgment was presented to their Lordships: Leave was given, and the appeal now comes before the Board for determination.

The substantial question upon the appeal arises upon S. 237 of the Criminal Procedure Code that follows S. 236, which provides that :

"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute the accused may be charged with having committed all or any of such offences,

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and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

That is followed by S. 237, which is the vital one in this case :—

"If, in the case mentioned in S. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here. The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under S. 237.

Their Lordships entertain no doubt that the procedure was a proper procedure and one warranted by the Code of Criminal Procedure.

The only other point remaining is this. The Code prescribes that the assessors shall give their opinions orally to the Judge. It is said that here they gave them in writing and the Judge dealt with them on that footing. The learned Judge says that is not so, and it is only faintly that this point is persisted in now. No such point was taken at the trial and no such point was raised until the end of the proceedings in the High Court, when the vakil for the prisoners raised it. Not only is it not shown that that aberration from the precise directions of the Code took place but, if it did take place, it has not been shown that it led to any miscarriage of justice at all.

This tribunal is not a Court of Criminal Appeal. When there has been evidence before the Court below and the Court below has come to a conclusion upon that evidence, their Lordships will not disturb that conclusion; they will only interfere in such circumstances as are referred to in the well known case of *Dillet* v. *The Queen* (1), where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process. Here there has been no abuse of that kind, and

1. (1887) 12 A C 459.

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there is a large amount of evidence on which the Court could come to the conclusion at which they arrived. It is therefore outside the constitutional powers of their Lordships' Board, conforming to the principles which it has laid down, to interfere with the decision of the Court below.

In these circumstances their Lordships are unable to advise His Majesty to take any other course than to dismiss the appeal.

Solicitors for appellants : *Ranken, Ford and Chester.*

Solicitor for respondent : *Solicitor, India Office.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD DUNEDIN, LORD ATKINSON, MR. AMEER ALI AND LORD SALVESEN.

Seth Motilal Hirabhai and others ... *Appellants**

v.

Bai Mani ... *Respondent.*

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Company—Mortgage of original shares (marked "A") by owner—Issue of new shares (marked "B") to original shareholders by way of distribution of excess profits—Whether new shares were accretions or accessions to the old—Civil Procedure Code, 1908, *S.* 47*—Redemption of mortgage—Application for execution of decree by transfer of shares—"Suit" or "proceeding"—Indian Contract Act (IX of* 1872), *S.* 163*—Increase of profit from goods bailed.*

Where a limited liability Company capitalises part of its excess profits and distributes them to its original shareholders in the form of new (called "B") shares *pro rata,* their respective holdings of the original (or "A") shares, *held,* that a mortgagee of the "A" shares could not resist the redemption of the "B" shares simultaneously with that of the "A" shares, the former having become part of the latter by accession, under S. 163 of the Indian Contract Act (IX of 1872).

Held, also the question as to the ownership of the "B" shares could, under S. 47 of the Civil Procedure Code, be decided and determined upon an application for execution of the redemption decree, instead of by a new suit being instituted for the purpose.

Appeal from a decree of the High Court (6th September, 1921) affirming an order of the First Class Subordinate Judge at Ahmedabad (28th September, 1918) and made in the execution proceedings of a redemption decree passed in favour of the plaintiff (respondent).

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*P C Appeal No. 139 of 1923. 5th December, 1924.

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The questions for determination in this appeal were:—

(1) Whether the plaintiff was entitled to have five shares of Rs. 1,000 each and five shares of Rs. 500 each of the "B" capital of the "Ahmedabad Ginning and Manufacturing Company, Limited," which were with the defendants (appellants), restored by them to her as being "accretions" to five shares of Rs. 1,000 each and five shares of Rs. 500 each of the "A" capital of the Company, which had been pledged by the plaintiff's father, Girdharlal, to Achratlal, who subsequently died and by his will appointed the defendants the executors thereof.

(2) Whether such questions as to title should not more appropriately be raised and dealt within a separate and independent suit instead of in the course of an application for execution of a decree in the original suit.

Both the Subordinate Judge (K. J. Desai, Esq.) and the High Court (Macleod, C. J. and Shah, J.) on appeal had decided the points in favour of the plaintiff. (*See* I. L. R. 46 Bom. 529). The defendants thereupon appealed to His Majesty in Council.

The facts appear sufficiently from their Lordships' judgment.

L. de Gruyther, K. C. and *E. B. Raikes* for appellants.

Sir George Lowndes, K. C. and *J. M. Parikh* for respondent.

5th December, 1924. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI :—This appeal arises out of proceedings in execution of a decree made by the Subordinate Judge of Ahmedabad on the 28th September, 1915, which was affirmed by the High Court of Bombay on the 26th June, 1917.

The circumstances that gave rise to this litigation are simple. It appears that one Achratlal had purchased 48 shares of Rs. 1,000 each and 48 sub-shares at Rs. 500 each issued by a Company which carried on business in Ahmedabad under the name of The Ahmedabad Ginning and Manufacturing Company. The purchase was made in the name of a person named Girdharlal Dalpat Ram. This Girdharlal was the nephew of a woman called Bai Gulab, who is said to have been under the protection of Achratlal. In the year 1883 a controversy arose between Achratlal and Girdharlal as to

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the real ownership of the 48 Rs. 1,000 shares and the 48 Rs. 500 sub-shares. Achratlal alleged that Girdharlal was only his *benamidar* and that in fact he was the real beneficial owner of the said shares. The contest was settled between Achratlal and Girdharlal on the 18th July, 1883. On that date an agreement was entered into by which it was agreed that 24 shares of Rs. 1,000 each and 24 sub-shares of Rs. 500 each were to be transferred to Achratlal under certain conditions. The remaining 24 shares of Rs. 1,000 and the 24 sub-shares of Rs. 500 were allowed to remain in the name of Girdharlal, subject to the following among other conditions :—

"That during the lifetime of Achratlal and Gulab, Girdharlal should not sell or mortgage the same without their consent, (2) that out of the amount to be received by Girdharlal as the dividend in respect thereof (excluding such shares as might have been sold with their consent) he was to retain for himself Rs 1,100 and hand over the balance, if any, to Achratlal and Gulab or the survivor of them, and (3) that after the death of both of those persons the shares were to belong to Girdharlal absolutely."

Shortly after the settlement Girdharlal appears to have got into financial difficulties and in September, 1883, Achratlal advanced him Rs. 7,500 without interest on the pledge by Girdharlal of five shares out of the 24 shares that had been allotted to him in his own right, consisting of Nos. 266-270 each of Rs. 1,000 and five sub-shares of Rs. 500 each corresponding thereto. These shares, which were pledged to Achratlal, were transferred to his name as mortgagee or pledgee thereof. Achratlal died two years after. Before his death, on the 12th February, 1885, Achratlal appointed by his will certain trustees, five in number, to carry out the directions of his will ; one of these trustees was Bai Gulab.

In 1886 the Company passed certain special resolutions to the effect that its capital should be increased by the issue of 350 shares of Rs. 1,000 and 350 sub-shares of Rs. 500, to be called "B" shares. And it was provided that those of the present shareholders who had a whole share of Rs. 1,000 should be given one whole share of Rs. 1,000 of the "B" capital, and similarly with regard to the sub-share. The second resolution provided :—

"That if in respect of these shares, a call be required to be made, the same be made in this manner that a call of half of the amount of the call which would be made in respect of a whole share, is made in the case of a half-share of Rs 500."

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The third resolution was as follows :—

"That until all the calls in respect of the 'B' capital are completed (? paid up), the dividend which is distributed every six months out of the earnings (? profits) be distributed on this understanding that a sum is to be deducted for depreciation in accordance with the provisions of the deed and a portion representing two annas (in the rupee), out of the actual (? net) earnings, is to be set apart for the Reserve (fund) and the remaining amount is to be distributed among the present shareholders as dividend."

The fourth resolution is in these terms :—

"That at the time of the declaration of the dividend as stated in the above clause, there should be an understanding that interest (? dividend) at the rate of (*i. e.,* amounting to) 6 per cent. is to be paid to the shareholders in cash and that the remainder is to be entered and acknowledged in the share certificate (as paid) on account of call."

Girdharlal appears to have been unable to carry out his obligation under the agreement of 1883, and had not paid to Bai Gulab the dividends he had undertaken to pay her out of the income of the shares he had pledged to Achratlal, and accordingly an arrangement was entered into between him and the trustees of Achratlal under which they advanced him a sum of Rs. 4,439, out of which they paid the dividends to Bai Gulab and debited Girdharlal with the amount thereof. The trustees have remained in possession of the shares pledged with Achratlal collecting the dividends and paid the value to Bai Gulab as provided in the old arrangement. They appear also to have received the "B" shares which were issued under the resolutions adopted in September, 1886, by the directors of the Company.

It is unnecessary to refer to certain other arrangements which were entered into between Girdharlal and Bai Gulab and the trustees as they do not bear directly on the present controversy.

Girdharlal died in 1892. The plaintiff in the suit before the High Court, who is the present respondent, is his daughter and heiress. She brought a suit in 1913 in the Court of the First Class Subordinate Judge of Ahmedabad against the five trustees of Achratlal's will, including Bai Gulab, for the redemption of the pledged shares "together with all the issues thereof that there may be at present."

The trustees (the defendants) in their defence to the plaintiff's action raised various questions which were decided by the High Court in the decision arrived at in 1917. No reference was made by the trustees in their defence to the

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"B" shares which they had obtained from the Company and which they held at the time, nor was any specific reference made to these "B" shares in the judgments of the Subordinate Judge and the High Court.

On the 20th February, 1918, the respondent, Girdharlal's daughter, applied to the Subordinate Judge of Ahmedabad for the execution of the decree passed in her favour on the 28th September, 1915, and which as already stated was affirmed by the High Court in June, 1917. Her application was to the effect that the trustees might be ordered to transfer to her the said five shares mentioned in the decree bearing Nos. 266-270, "together with all sorts of 'Bachan' (issues) appertaining to the same," and she brought to the Court the amount she was directed to pay for the redemption of the mortgaged shares.

The trustees admitted that she was entitled to redeem the "A" shares bearing Nos. 266-270 and their "Bachan" existing at the time of the mortgage, but denied her right to the "B" shares.

Bai Gulab died during the course of these proceedings, and one Harilal, who styled himself the trustee of Bai Gulab, was placed on the record on the 18th July, 1918. His case is that he was by virtue of Bai Gulab's right entitled to the "B" shares as representing dividends to which she was entitled in her lifetime.

On this state of facts two questions arose for determination in the Courts in India. First, whether the plaintiff was entitled to proceed under S. 47 of the Code of Civil Procedure, or whether she was bound to bring a separate action for the relief she was seeking. Secondly, whether the "B" shares which were held by the trustees were in fact the "Bachan" of the original shares called "A" shares. Both the Subordinate Judge and the High Court have held that the plaintiff was entitled to proceed under S. 47 and that in fact the "B" shares were included in her original claim as "accretions" to the "A" shares, the word "issue" being wide enough to cover the claim.

On appeal before His Majesty in Council the contentions advanced by the trustees have been repeated with some force. In their Lordships' opinion the S. 47 of the Code of Civil Procedure referred to above covers fully the present controversy. The section runs thus :—

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"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

Every matter relating to the "execution, discharge or satisfaction" of the decree has thus to be dealt with in the execution proceedings. The new sub-section, which runs thus:—

"The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees,"

gives to the Court the power of converting an application into a suit or a suit into an application. It is not necessary, however, to lay stress on this particular provision, as the first section abundantly covers the question in debate.

The question is whether or not by the word "Bachan" the "B" shares are included in the claim. The object of the proceeding is to have this question determined upon considerations which necessarily are connected with the original case. In that view the application appears to their Lordships to be fully competent under S. 47. The main question, however, remains, *viz.*, whether the plaintiff is entitled to redeem the "B" shares. It has been objected that in the present proceedings the rights of Bai Gulab cannot be properly adjudicated. In their Lordships' opinion any declaration made in these proceedings cannot affect the right (if any) of Bai Gulab to the shares in dispute. It is quite competent for her personal representative, she having died, to bring an action for the ascertainment of her rights. But it is equally clear that the mortgagees have no right to withhold the "B" shares from the plaintiff. The Ginning and Manufacturing Company compulsorily capitalised the excess profits after payment of dividends of 6 per cent. The company was perfectly competent to make such capitalisation and there is nothing to show that it was invalid in any way. These shares were received by the trustees, as arising out of and appertaining to the original "A" shares, and it is impossible to contend that the right to these shares could be differentiated from the right to the "A" shares. It has been objected that the word "accretion" applied by the Subordinate Judge and the High Court in respect of the "B" shares does not apply to moveable property. It may be that the word "acrretion" is not quite appropriate to moveable property. But S. 163 of the Indian Contract Act (Act IX of 1872) is clear on the point. It declares :—

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"In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed."

These shares are clearly accessions to the shares expressly pledged or hypothecated, and the pledger or his representative, the present plaintiff, is entitled to recover the same.

Mr. Justice Shah, one of the Judges in the Appellate Court, in a well-balanced judgment has held as follows :—

"It is clear that the old shares carried with them the right to the allotment of the new shares. For instance, it is difficult to hold that if the shares had not been mortgaged and transferred to Achratlal and had continued in the name of Girdharlal, the new shares could have been or should have been issued to Achratlal as part of the profits of the old shares, and it is not suggested on behalf of the defendants that in respect of the remaining 19 shares or such of them as continued in the name of Girdharlal, the trustees of Achratlal have or could have claimed the shares of the new capital 'B' issued to Girdharlal as part of the dividends which were claimable by them under the settlement. The right to be allotted the new shares went with the old shares; and I find nothing on the record to support the view that the new shares formed part of the dividends in respect of the old shares. The evidence as to how the calls were received is not clear; but it seems to me to be a fair inference under the circumstances that the profits of the Company were capitalised and that the new shares were allotted to the holders of the old shares as part of the capital and did not represent the dividends on the old shares. At any rate the trustees have produced no evidence to show that that is not the correct inference. On the contrary their own statement of the profits received shows that the new shares were not treated as part of the dividends received on the old shares."

Their Lordships concur generally with the conclusions arrived at by the High Court, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants : *E. Dalgado.*

Solicitors for respondent : *T. L. Wilson and Co.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Tirupathi Goundan ... *Appellant** (*Defendant*)

v.

Shamanna Goundan and others... *Respondents* (*Plaintiffs*).

Tirupathi Goundan v. Shamanna Goundan.

Madras Estates Land Act, S. 3 (2) (*c*) *and* (*d*)—*Estate—Jaghir of villages granted by East India Company in* 1829 *and confirmed at Inam Settlement—Grant of land itself or land revenue only—Tests—Evidence—Landlord's suit in ejectment—Occupancy right set up by tenants—Onus of proof of.*

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*S A Nos. 299, 300, 301 and 254 of 1922. 17th September, 1924.

Tirupathi Goundan v. Shamanna Goundan.

The question for decision was whether or not the respondents had a right of permanent occupancy in the plaint land, and it depended upon the terms of a grant of two villages in which the plaint land was situated made to *M* in 1829 and upon the subsequent history of those villages.

The grant to *M* in 1829 was made by the East India Company in lieu of a money grant which had been made on account of the services rendered by *M* to the said Company. The grant was afterwards confirmed at the time of the Inam Settlement. The grant was for three generations.

The circumstances in favour of the respondents' contention were, (1) that the villages were granted in lieu of a money grant and that the beriz of the village was taken into account in order to determine the income from the villages, and (2) that the sannad contained the following recital, "In order to make the ryots and others in the two villages given as aforesaid to obey your orders, you should publish it as well so as to proclaim it to all."

The circumstances in favour of the appellant's contention were, (1) there was no evidence that there were any tenants with occupancy rights at the time of the grant, (2) the respondents' evidence carried the possession of the respondents and their ancestors back only to 1849, and there was no explanation offered by them as to how their ancestors came into possession, (3) the evidence supplied by the Inam Register showed that the cultivation was not permanent and that the income varied from year to year, and (4) the grant comprised not only cultivated portions but all the uncultivated portions as well as waste portions and poramboke, etc.

Held, reversing the Court below, that it was for the respondents to prove that they had occupancy rights, that the villages in question were not an estate within the meaning of S. 3 of the Estates Land Act, and that the respondents had not proved occupancy right in the plaint land.

By the mere use of the word "jaghir" the villages could not be said to be an estate.

Quaere: Whether a jaghir in order to come within the definition of S. 3 of the Estates Land Act must be a jaghir before the time of the East India Company.

Second Appeals against the decrees of the Court of the Subordinate Judge of Vellore in A. S. Nos. 30, 31, 32 and 33 of 1921, preferred against the decrees of the Court of the District Munsif of Tiruppathur in O. S. Nos. 63, 64 and 84 of 1918 and O. S. No. 60 of 1919 respectively.

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar and *S. Srinivasa Aiyar* for appellants.

A. C. Sampath Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—The only question argued in the Second Appeals is whether the respondents have a right of permanent occupancy in the plaint lands. The question whether the res-

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pondents have an occupancy right or not would depend upon the terms of the grant Ex. A and the subsequent history of the villages granted to Muhammad Moosa Sahib in 1829. Ex. A is the sannad given to Moosa Sahib by the East India Company, by which two villages were granted to him in lieu of a money grant which was made on account of the services rendered by him to the East India Company. The amount originally granted was Rs. 1,700, being the income of these villages. Moosa Sahib wanted one village to be granted in lieu of these villages and he was willing to retain one of the seven villages originally granted. The sannad gave him two villages and the grant comprises not only cultivated portions but all the uncultivated portions as well as waste portions and poramboke, etc. This grant was afterwards confirmed at the time of the Inam Settlement. The grant was for three generations. The contention on behalf of the appellant is that what was granted was not an estate and that there were no tenants on the land at the time with rights of occupancy and that the subsequent history of the villages shows that no tenant had occupancy right in the lands. On behalf of the respondents it is urged that what was granted was an estate within the meaning of the Estates Land Act and that as the respondent continued to be in possession at the time when the Estates Land Act came into force, by virtue of S. 6 of the Act they acquired an occupancy right though they had it not before. The question is not free from difficulty. Both the Lower Courts have found that the respondents have occupancy rights and have decreed their suit.

Ex. A is no doubt favourable to the contention of the respondents. There are two statements in it which I think to some extent support the contention of the respondents. One is that the villages were granted in lieu of a money grant and that the beriz of the village was taken into account in order to determine the income from the villages. The second is the following recital, "In order to make the ryots and others in the two villages given as aforesaid to obey your orders, you should publish it as well so as to proclaim it to all." *Prima facie* it would appear there were ryots on the land in the two villages. If Ex. A had stood alone, it might lend considerable support to the respondents' contention but Ex. XIV, the Inam Register prepared in 1865, which gives the history of the villages is opposed to their contention. In Fasli 1211, the extent of the village is given as 3244.92 acres, of which

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728.17 acres were poramboke. Of the remaining 2516.75 acres, the dry land was 1083.52 acres and wet 38.36 acres. Dry waste is given as 1322.14 acres and wet waste 72.73 acres. Therefore out of the total, the waste land was more than half of the land in the village excluding the poramboke. In Fasli 1270 the extent of dry cultivation is given as 1191.85 and that of wet cultivation as 62.38 and the extent of the remaining wet and dry waste is 1262.52 acres. There is a remark on page 4 to the effect that " the value of the village should be fixed at the beriz of Fasli 1261, that is, the one fixed by Mr. Phillips, and the reason assigned by them is that though the present cultivation is 2,200 acres, the cultivation is not permanent. It is permanent nowhere and the actual cultivation is not strictly ascertained......They are not able to give any reliable account of the past year's beriz. The villages are held by one of the Jaghirdars on rent from others and they fixed it at a sum which does not exhibit the actual value of the cultivation." The villages descended to the heirs of Moosa Sahib and they held the villages in several shares. According to the Muhammadan Law, as understood by the Kazi, whenever any sharer died without any issue, his share lapsed or escheated to the Government. But the Government did not take over his share but added the income due to his share to the jodi fixed on the villages and the persons in possession were asked to pay to the Government the income from such share together with the jodi. It is clear from the statement in the Inam Register that there was no permanent cultivation of the land and that the amount of cultivation varied from year to year. This circumstance is strongly opposed to the contention that there were tenants with rights of permanent occupancy of the land and the statement that " the villages are held by one of the Jaghirdars on rent from others and that they fixed it at a sum which does not exhibit the actual value of the cultivation" shows, I think, that the income was derived from the actual cultivation of the land and not from the tenants who paid a certain amount to the landlord. It is not suggested that the sharing system prevailed in this village, in which case it might be that the income varied from year to year depending upon the cultivation. But the income was only calculated in money and therefore the statement in the Inam Register should be considered as referring to the actual cultivation by the inamdars either through their own servants or by giving leases to people pre-

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pared to cultivate the land. Their Lordships of the Privy Council rely upon the history of an estate in order to determine the existence or otherwise of permanent occupancy rights. *Venkata Sastrulu* v. *Sitharamudu* (1). In this case the history of the two villages affords considerable weight to the contention of the appellant that the respondents had no occupancy right. In the first place, there is no evidence that there were any tenants with occupancy rights at the time of the grant. Secondly, the evidence of the fifth witness is that he and his ancestors enjoyed the land during the last 70 years. He gave his evidence in 1919 and 70 years from that date would carry us back to 1849. The grant was made in 1829 and there is no explanation offered by him as to how his ancestors came into possession. Thirdly, there is also the evidence supplied by the Inam Register that the cultivation was not permanent and that the income varied from year to year.

It is well settled now that there is no presumption that a tenant has occupancy rights. If the property in dispute is an estate, then under S. 6 of the Estates Land Act, he gets occupancy rights. But where it is not an estate the onus is upon him to prove that he has occupancy rights. In *Nainapillai Marakayar* v. *Ramanathan Chettiar* (2) their Lordships observe : " It cannot now be doubted that when a tenant of land in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent occupancy in the lands the onus of proving that he has such a right is upon the tenant. " That being so, it is for the respondents to prove that they have occupancy rights. It is urged on behalf of the respondents that these villages were granted as jaghir to Moosa Sahib and that therefore these villages formed an estate within the meaning of S. 3 of the Estates Land Act. Mr. Sampath Aiyangar relied upon S. 3, cl. 2 (*c*), that any unsettled palayam or jaghir is an estate. The Subordinate Judge is of opinion that a jaghir in order to come within the definition of S. 3 must be a jaghir before the time of the East India Company. Without considering whether such an opinion is well founded or not, we have to see whether by the mere use of the word ' jaghir ' the incidents of an estate would attach to any property. It was strongly urged for the respondents that as the word ' jaghir ' is used in Ex. A, the sannad, the villages must be considered as

1. (1919) I L R 43 M 166 at 172 : 37 M L J 142 (P C).
2. (1923) I L R 47 M 337 : 46 M L J 546 (P C).

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possessing all the incidents of a jaghir. The use of the word 'jaghir' by itself does not signify much. Mr. Justice Coutts Trotter, as he then was, observes in *Sam* v. *Ramalinga Mudaliar* (3), "I have come to the conclusion that these lands, though so described, are not jaghirs within the meaning of the Estates Land Act but are merely ordinary inam." We have therefore to see whether these villages form an estate within the meaning of S. 3 of the Estates Land Act apart from the mere use of the word 'jaghir.' The respondents rely upon the statements in the *Salem District Manual* which described these villages as jaghir. I do not think that by the mere use of the word 'jaghir' the villages can be said to be an estate.

It is next urged for the respondents that if it is not 'jaghir' it must be considered to be an inam within the meaning of sub-cl. (*d*) of S. 3, cl. 2. In that case, any village of which the land revenue has been granted in inam to a person not owning the kudivaram thereof would be an estate. To say this is an inam would be begging the question. The question is whether the land revenue alone was granted in this case or whether the land itself was granted. In *Mussammat Sakina Bai* v. *Kaniz Fatima Begam* (4) their Lordships of the Privy Council held, "the word 'jaghir' primarily points to occupancy, though it may be occupancy of an office such as that of Collector of revenue. Where, however, a jaghir held for life only is, as in this sannad, used in contradistinction to an ilaka held as a permanent zamindari, it is an almost necessary inference that the occupancy referred to is occupancy of land." By the sannad, not only cultivated land but waste, poramboke, jamabandi, kattumaniam and inam were granted. It is urged by Mr. Ramachandra Aiyar who appears for the appellant that the fact that poramboke and waste land was given shows that it was land that was given and not merely land revenue. He further contends that a good portion of the waste land was brought under cultivation and that it cannot be said there were any tenants with occupancy right on the waste land. That a good deal of waste land was brought under cultivation is clear from Ex. XIV. When waste land was given to the grantee, it cannot be said that land revenue alone was granted. That being so, the grant does not come within the purview of S. 3, cl. 2 (*d*).

3. (1916) I L R 40 M 664 at 671 : 30 M L J 600 (P C).
4. (1917) 22 C W N 577 (P.C).

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It is urged for the respondents that the onus is upon the landlord to show that lands are not subject to occupancy right. That argument assumes that the villages are an estate. If the villages are an estate within the meaning of cl. 3, no doubt the onus would be upon the landlord to show that the lands are not subject to occupancy right ; in other words, the lands are not ryoti lands. But in this case we have to determine from the evidence whether the villages are an estate or not. That being so, Ss. 23 and 185 of the Estates Land Act do not help him. It is urged by Mr. Ramachandra Aiyar that the original grant of money was about Rs. 1,700, and that the income from the villages was only about Rs. 1,500 and odd, and that in order to make up for the balance waste and other lands were given. That argument receives support from the statement in the Inam Register, "The only indirect explanation for his deficiency is found in the reservation of the poramboke lands and resumed kuthu kodigi inams for the use of the Jaghirdar in right as profit." That waste lands were given to the grantee under Ex. A cannot be disputed. That they could not have been in anybody's possession is apparent. There is no evidence in this case that there were any tenants at the time of the grant in 1829. It is urged for the respondents that it was not likely that the East India Company's agents cultivated the lands and that there must have been tenants on the land. The mere fact that Government was able to get an income does not show there were tenants with rights of occupancy as in the case of ryotwari land. If it was ryotwari land then pattas must have been issued to the persons in occupation. No such evidence is forthcoming in this case. It is open, no doubt, to the Government to grant a ryotwari village as inam to a person. In such cases, the revenue alone is inam. In the absence of evidence it cannot be presumed from the mere fact that Ex. A speaks of beriz, it must be beriz derived from the tenants with rights of permanent occupancy. The lower Courts have come to the conclusion that the respondents have occupancy right on the ground that the villages were granted as jaghir. They overlooked the fact that the onus is upon the tenants to prove that they have occupancy right. I hold that the villages in question are not an estate within the meaning of S. 3 of the Estates Land Act and that the respondents have no occupancy right in the plaint land. In the result, the appeals are allowed and the judgments of the Lower

Courts are set aside and the plaintiffs' suits are dismissed with costs throughout.

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In S. A. No. 254 *of* 1922 :— The judgments of the Lower Courts are set aside and the case remanded to the Munsif's Court for trial of the remaining issue. The appellant is entitled to his costs in this Court and the Lower Appellate Court. The costs in the Munsif's Court would abide the result of the suit.

Appellant will have refund of the Court-fee paid in this Court.

A. S. V. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Dakshinamurthi Mudaliar (died) and others ... *Appellants** (*L. Rs. of the* 1*st Appellant-defendant*)

v.

Dhanakoti Ammal ... *Respondent* (*Plaintiff*).

Dakshinamurthi Mudaliar v. Dhanakoti Ammal.

Contract—Time if of essence of—Rule as to—Applicability to contract for re-sale—Contract of sale and agreement to re-sell—What amounts to—Vendor allowed to remain in possession as tenant at a rate of rent fixed—Acceptance of rent fixed from vendor—If part-performance of contract to re-sell—Acts of part-performance which will attract operation of principle.

The plaintiff's husband, the original owner of the suit property, sold it to *A*. *A*, being anxious to sell the property in his turn, applied to plaintiff's husband to find another purchaser. The defendant agreed to purchase, and the plaintiff's husband caused *A* to sell the property to the defendant. At the time of the sale, the plaintiff, her husband, and the defendant entered into an arrangement that the defendant should execute an agreement in favour of the plaintiff containing the followig terms, *viz.*, that the plaintiff should keep the suit house in her possession, that the plaintiff and her husband should pay regularly Rs. 4-8-0 every month or once in two months at the same rate, being the amount due at 0-12-0 per cent. per mensem for the sale amount of Rs. 600, that the plaintiff should pay the defendant the principal sum of Rs. 600 before 14th December, 1914, and that, *if payment be made in that manner*, the defendant should execute and register a sale deed for the suit house. Such an agreement was executed by the defendant.

No money was tendered by plaintiff within 14th December, 1914. She continued to occupy the house and to pay the rent up to June 1918. On 11th June, 1918, the defendant issued a notice to quit and the plaintiff replied relying upon the agreement and sent Rs. 600 and arrears of rent Rs. 22-8-0, which the defendant rejected.

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*S A No. 713 of 1922. 27th November, 1924.

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In a suit brought by the plaintiff for specific performance of the agreement, *held,* (1) that the agreement, though one-sided, was a contract, (2) that the transaction between the parties was substantially a contract of sale with an agreement to re-sell ; (3) that the principle that, in contracts of sale of real property, time is not generally of the essence of the contract, was not applicable to contracts to re-sell ; and (4) that the acceptance of rent beyond 14th December up to June 1918 was not, though the rent fixed represented a rate of interest at 9 per cent. on the purchase money stipulated, such part-performance as to attract the operation of the principle of part-performance.

The main contract was one of re-sale and there was a subsidiary contract of tenancy up to the re-sale and all the acts of part-performance are explainable either as due to mere inaction or a willingness to continue the tenancy as one from month to month.

Held, therefore, that the plaintiff's suit must fail.

Second appeal against the decree of the Court of the Subordinate Judge of Chingleput in A. S. No. 79 of 1921 (A. S. No. 105 of 1921, District Court, Chingleput) preferred against the decree of the Court of the Additional District Munsif of Chingleput in O. S. No. 292 of 1919.

K. Balasubramania Aiyar for appellants.

L. A. Govindaraghava Aiyar and *P. S. Narayanaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The facts of this Second Appeal are simple and may be thus stated.

The plaintiff's husband, Neelaveni Naicker, was the original owner of the property. He mortgaged it to a Fund at St. Thomas Mount. Unable to pay the mortgage debt he sold the house to his brother-in-law Appu Naicker for Rs. 600 (Ex. II, dated 19th September, 1907) and paid off the debt. Some time after, Appu Naicker was in need of Rs. 600 and applied to Neelavani for finding another purchaser. The latter found a willing vendee in the defendant and caused Appu Naicker to sell the property to the defendant (Ex. III, dated 26th November, 1909). At the time of the sale, the plaintiff, her husband and the defendant entered into an arrangement that the defendant should execute an agreement in favour of the plaintiff containing the following terms, *viz.*, that the plaintiff should keep the suit house in her possession, that the plaintiff and her husband should pay regularly Rs. 4-8-0 every month or once in two months at the same rate, being the amount due at 0-12-0 per cent. per mensem for the sale amount of Rs. 600; that the plaintiff should pay the defendant the principal sum of Rs. 600 before the 14th December,

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1914 and that, *if payment be made in that manner,* the defendant should execute and register a sale-deed for the suit house. Such an agreement was executed but is not forthcoming. The Courts below relying on Ex. I have found that its execution has been proved.

It is now admitted that no money was tendered by plaintiff within 14th December, 1914. The plaintiff continued to occupy the house. On 11th June, 1918 the defendant issued a notice to quit and the plaintiff replied by Ex. IV-a relying on the agreement and sent Rs. 600 and arrears of rent Rs. 22-8-0, but the amount was rejected by the defendant. The present suit for specific performance was filed on 12th March, 1919.

The District Munsif dismissed the suit on the ground that as the plaintiff did not tender the amount within 14th December, 1914, she is not entitled to specific performance. The District Judge, reviewing the District Munsif's judgment, held that time was not of the essence of the contract and gave a decree. The defendant appeals.

If the agreement by the defendant to convey the property to the plaintiff is an ordinary contract to sell, I would have been inclined to dismiss the Second Appeal. But, on the allegation of the plaintiff and the findings of the Court below, it is a case of a sale to defendant followed by an agreement to re-sell. The fact that the re-sale was not to be in favour of Appu Naicken or to Neelaveni Naicker does not make any difference. It is the plaintiff's husband, even though he sold the property to Appu Naicker, and not Appu Naicker that arranged the sale to the defendant and he stipulated that there shall be a re-sale to this nominee, his wife, the plaintiff. This is substantially a contract of sale with an agreement to re-sell.

It is doubtful whether the principle laid down in *Jamshed Khodaram* v. *Burjorji Dhunjibhai* (1), that in contracts of sale of real property, time is not generally of the essence of the contract, is applicable to contracts to re-sell. On the other hand, it was held that the right to re-purchase must be exercised according to the strict terms of the power [*Samarapuri Chettiar* v. *Sudarsanachariar* (2), relying on *Ivy* v. *Birch* (3), *Ranelagh* v. *Melton* (4) and *Dibbins* v. *Dib-*

1. (1915) I L R 40 B 289 : 30 M L J 186 (P C).
2. (1919) I L R 42 M 802 : 37 M L J 109.
3. (1836) 7 E R 22.
4. (1864) 62 E R 627.

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bins (5)]. [*See* also *Maung Po Yin* v. *Maung Shwe Kin* (6).] The same view was taken in *Maung Wala* v. *Maung Shwe Gon* (7) following *Samarapuri Chettiar* v. *Sudarsanachariar* (2). The ground on which relief was given to the purchasers in that case, *viz.*, that the tender at the due date was made impracticable by default of the payee does not arise here. [See also Fry on *Specific Performance,* S. 1163, 6th Edn., p. 515.]

Mr. Govindaraghava Aiyar contends that there has been a part-performance of the contract and therefore it does not matter that the purchase money was not tendered within 14th December, 1914. The part-performance he relied on is the acceptance of rent beyond 14th December, 1914, up to June, 1918. He relied on *Vizagapatam Sugar Company* v. *Muthurama Reddi* (8), *Hiralal Ramnarayan* v. *Shankar Hirachand* (9), *Hodson* v. *Henland* (10) following *Biss* v. *Hygate* (11) and *Miller* v. *Finlay* (12). There is no doubt as to the principle of these cases but Mr. Balasubramania Aiyar argued that it is not every kind of part-performance that will attract to operation of the principle. In *Maddison* v. *Alderson* (13) Lord Selborne after referring at page 478 to Lord Hardwick's statement of the rule in *Gunter* v. *Halsey* (14) and his opinion that the payment of purchase money in whole or in part as a sufficient part-performance, and pointing out that his application of the rule was not followed by Lord Cowper and Lord Macclesfield proceeds at page 479 : "All the authorities show that the acts relied upon as part-performance must be unequivocally and in their own nature referrable to some such agreement as that alleged : *Cooth* v. *Jackson* (15), *Frame* v. *Dawson* (16) and *Morphett* v. *Jones* (17)." "The acknowledged possession," said Sir T. Plumer in *Morphett* v. *Jones* (17), "of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms, the Court regarding what

2. (1919) I L R 42 M 802 : 37 M L J 109.
5. (1896) 2 Ch 348. 6. (1922) 1 Bur L J 167.
7. (1923) I L R 2 R 472.
8. (1923) I L R 46 M 919 : 45 M L J 528 (F B).
9. (1921) I L R 45 B 1170. 10. (1896) 2 Ch 428.
11. (1918) 2 K B 314. 12. 5 L T R (N S) 510.
13. 8 A C 467 14. Amb 586. 15. 6 Ves 38
16. 14 Ves 386. 17. 1 Sw 181.

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has been done as a consequence of contract or tenure." "It is in general," said Sir James Wigram [*Dale* v. *Hamilton* (18)], "of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part-performance taking the case out of the Statute of Frauds ; as for example, the payment of a sum of money alleged to be purchase money. [*See* also *Britain* v. *Rossiter* (19), per Lord Justice Cotton]. The acts of part-performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use or tenure in the land." At page 484, Lord O'Hagan quotes Sir William Grant in *Frame* v. *Dawson* (20) : "The principle of the cases is that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement, and then parol evidence is admitted to show what the agreement is." In *Vizagapatam Sugar Company* v. *Muthurama Reddi* (8) possession was delivered in pursuance of the contract. So also in *Hiralal Ramnarayan* v. *Shankar Hirachand* (9). The cases of *Hodson* v. *Heuland* (10), *Biss* v. *Hygate* (11) and *Miller* v. *Finlay* (12) are cases where the main contract itself was one of tenancy and though the entry into possession in the former case was prior to the contract, the continuance of possession was distinctly referable to the contract. These cases cannot help us here when the main contract is one of re-sale and there is a subsidiary contract of tenancy up to the re-sale and all the acts of part-performance are explainable either as due to mere inaction or a willingness to continue the tenancy as one from month to month. The acceptance of rent after 14th December, 1914 amounts to no more than a renewal of the

8. (1923) I L R 46 M 919 : 45 M L J 528 (F B).
9. (1921) I L R 45 B 1170. 10. (1896) 2 Ch 428.
11. (1918) 2 K B 314. 12. 5 L T R (N S) 510.
18. 5 Hare 381.
19. (1879) 11 Q B D 123 at 130. 20. 14 Ves 387, 388.

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tenancy as a tenancy from month to month. I am quite alive to the fact that the rent fixed, *viz.*, Rs. 4-8-0 represented a rate of interest at 9 per cent. on the purchase money stipulated, but I do not see how this makes any difference. The defendant might have thought that the tenancy with a rent of Rs. 4-8-0 is as good a letting as any he can otherwise procure. Mr. Balasubramania Aiyar relied on *Williams* v. *Owen* (21). This case supports him, though, as Mr. Govindaraghava Aiyar pointed out, it is a case where the Courts might well have construed the contract (in the light of principles laid down in later cases) to be one of mortgage and not one of sale and agreement to re-sell. On the pleadings and on the facts of this case (the person entitled to the conveyance and the re-sale, the plaintiff, being different from the original vendor Appu Naicker) that alternative is not open to the plaintiff it not being suggested that plaintiff is a benamidar for her husband.

The principle has been stated in Fry on *Specific Performance* at page 279 (S. 584) : " To make the acts of part-performance effective, to take the contract out of the Statute of Frauds, they must be consistent with the contract alleged and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract [*Gunter* v. *Halsey* (14)] therefore if a tenant in possession sues for the specific performance of an alleged contract for a new lease, the mere fact of his continuance in possession will have no weight as an act of part-performance of the contract, being referable to his character as tenant [per Plumer, M. R. in *Morphett* v. *Jones* (17)] and other cases and distinguished by *Hodson* v. *Heuland* (10) and *Biss* v. *Hygate* (11) which are not cases of renewal of the lease but of fresh lease. In the present case, the contract of possession can have no weight as an act of part-performance of the contract to re-sell there being a tenancy and the continuing of possession is explainable as evidence of a willingness to continue the tenancy.

In my opinion, there is no such part-performance as will help the plaintiff. There is no question of limitation in the case.

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10. (1896) 2 Ch 428. 11. (1918) 2 K B 314.
14. Amb 586. 17. 1 Sw 181.
21. 41 E R 386 : 5 My & Cr 303.

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I may add that Mr. Balasubramania Aiyar relying on *Nagappa Naidu* v. *Muniswami Aiyar* (22) contended that the agreement to re-sell being one-sided is no contract at all. But the present case is distinguishable from *Nagappa Naidu* v. *Muniswami Aiyar* (22) in which the agreement to re-sell and the original sale were at different times and were separable. In the present case the whole arrangement constituted one agreement, the option to re-purchase is one term of the whole contract. This contention must be disallowed.

For the other reasons given, the plaintiff must fail and the appeal will be allowed and the plaintiff's suit is dismissed with costs throughout.

A. S. V. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD DUNEDIN, LORD ATKINSON, MR. AMEER ALI AND LORD SALVESEN.

Musammat Maina Bibi, since deceased (now represented by Chaudhri Khalilul Rahman and others), and others ... *Appellants**

v.

Chaudhri Vakil Ahmad and others ... *Respondents.*

P. C.

Musammat Maina Bibi v. Chaudhri Vakil Ahmad.

Mahomedan Law—Widow's dower—Deceased's immoveable property—Widow's right to possession until dower-debt satisfied—Civil Procedure Code, 1908, *S.* 11—Res judicata—*Dismissal of suit for immediate possession upon non-fulfilment of condition in decree as to payment—Effect of.*

A Mahomedan widow has the right lawfully, peaceably, and without force or fraud to take and hold possession of her deceased husband's immoveable property until her dower-debt is satisfied. This right is given to her as a creditor by Mahomedan Law, and is subject to her accounting for the profits accruing from the property. *Bibi Bachun* v. *Shaikh Hamid Husain,* 14 Moo. I A 377 referred to.

Her position contrasted with that of a mortgagee.

Where the heirs of a deceased Mahomedan obtained a decree for immediate possession against his widow who was in possession of the properties in lieu of her dower-debt, on condition they paid her a certain sum of money within a period fixed, but on account of their failure to pay the said amount, their suit was dismissed, such dismissal does not deprive them of their proprietary

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*P C Appeal No. 79 of 1922. 11th December, 1924.

22. (1922) I L R 46 M 30 : 42 M L J 432.

P. C.

Musammat Maina Bibi v. Chaudhri Vakil Ahmad.

rights to recover possession at some future time. In such a case S. 11, Civil Procedure Code, does not apply.

Appeal from a decree of the High Court of Judicature (Rafique and Lindsay, JJ.), dated 12th March, 1919, which affirmed a decree of the Subordinate Judge of Allahabad (G. Prasad, Esq.), dated 18th March, 1916.

The facts appear sufficiently set out in the judgment of their Lordships.

L. de Gruyther, K. C. and *K. Brown* for appellants.

Sir George Lowndes, K. C. and *B. Dube* for respondents.

11th December, 1924. The Judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON :—This is an appeal from a judgment and decree, dated the 12th March, 1919, of the High Court of Judicature at Allahabad affirming the decree of the Subordinate Judge of Allahabad, dated about three years earlier, namely, the 18th March, 1916. The main, if not indeed the determining, question for decision by the Board in this case is the proper construction and effect of a certain decree of the Subordinate Judge of Allahabad, dated the 28th November 1903, duly affirmed on the 3rd July, 1906, by the aforesaid High Court on appeal thereto. This latter decree was made in a suit brought by the present respondents and others against the widow of the deceased owner of certain lands and premises described in the plaint in which she was then in lawful possession under a claim to hold the same until the dower-debt to which she was admittedly entitled should have been paid to her.

After the death on the 6th May, 1890, of this owner named Shaikh Muin-ud-din, a considerable amount of litigation was set on foot between several persons claiming to be interested in or have claims upon his property. This litigation has been fully dealt with in the clear and admirable judgments delivered in this case by the Subordinate Judge and by the High Court respectively. It is only necessary, however, in this appeal to refer to such of the suits as bear directly upon the questions requiring decision by the Board.

In addition, all these learned Judges have in their judgments cited and criticised with acuteness a great many authorities, analysed the evidence, and dealt fully with the relevant facts proved. As their Lordships agree with them in the conclusions of law and fact at which they have arrived, it is

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scarcely necessary for the third time, to cite and criticise more than one of these authorities, or to deal with the established facts in great detail. In their view the application of some few well-established principles of the Mahomedan Law to the salient facts of the case will enable the appeal to be satisfactorily disposed of.

The widow of the above-mentioned owner of the property in suit, immediately on the death of her husband, admittedly took possession of his immoveable property, including the property in suit, and procured her name to be entered on the registry as its possessor instead of his.

It appears to their Lordships that it will suffice to refer to only one of the authorities cited as to the rules of the Mahomedan Law touching the rights and liabilities of Mahomedan ladies in relation to their claim for dower. That is the case [*Musammat Bibi Bachun* v. *Shaikh Hamid Husain* (1)], decided by this Board over fifty years ago, and accepted as a sound as well as a binding authority.

In that case a Mahomedan widow whose husband had died without issue was put into possession of her husband's estate as a co-heir and to secure her dower. The point in controversy was whether, having been so put into possession, she was entitled to retain it until her dower-debt was paid, to the exclusion of the other heirs of the deceased. It was held that she was so entitled. Sir Montagu Smith in delivering judgment said " the claim of Musammat Bibi Bachun to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower, for such a right does not arise by Mahomedan Law as the consequence of any gift of dower, nor was there any agreement entered into on the part of the husband to pledge his estate for the dower. But the appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied, and the respondents cannot recover possession unless that satisfaction has taken place. It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein* v. *Musammat Khodeja* (2). Whatever the right may be call-

1. (1871) 14 Moore's I A 377.
2. (1868) 10 W R 369.

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ed, it appears to be founded on the power of the widow as a creditor for her dower to hold the property of her husband of which she has lawfully and without force or fraud obtained the possession until her debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. This seems to be the ground upon which the claim of the widow to retain the possession of the property was put in the case of *Ameer-un-nissa* v. *Moorad-un-nissa* (3)." This decision is well supported by many authorities. In the first-quoted sentences of his judgment Sir Montagu Smith alluded to a feature of the case with which he was dealing which distinguishes it from the case of mortgage usufructuary or other. In the case of a mortgage the mortgagee takes and retains possession, under an agreement or arrangement made between him and the mortgagor. Any rights the mortgagee may get are conferred upon him by the mortgagor. In the present case, as well as in that dealt with by Sir Montagu Smith, neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the agreement or the bounty of her deceased husband. The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her by the Mahomedan Law. The husband, when he grants dower to his wife, cannot, according to Sir Montagu Smith, by any original hypothecation of his property, secure to her the payment of it. But the original and intentional hypothecation of the mortgaged property to secure the repayment of the mortgage debt is the very essence of every mortgage usufructuary or other. The difference between a usufructuary mortgage and an ordinary mortgage is not so much a difference in the kind of security created as in the method of enjoying it. In each case the property of the mortgagor is pledged to secure the debt, and when the amount secured is paid, the property pledged must be returned to the owner. The main difference between a usufructuary mortgage and an ordinary mortgage is that in the former it is part of the initial agreement by which the security is created that the mortgagee shall at once go into possession of the mortgaged property and apply the proceeds he may derive from the use and occupation of it to discharge the mortgage debt ;

3. (1857) 6 Moore's I A 211.

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while in the case of an ordinary mortgage of the usual sort it is in general not the initial intention of the parties that the mortgagee should go into possession of the property pledged immediately or at all, although he is empowered to do so if the interest on the mortgage money be not paid. Should he go into possession, he must account for the receipts just as must the usufructuary mortgagee.The widow who holds possession of her husband's property until she has been paid her dower has no estate or interest in the property as has a mortgagee under an ordinary mortgage. Mr. de Gruyther called the attention of the Board to the provision of the 58th and following sections of the Transfer of Property Act, and urged their Lordships to apply, by analogy, the principles embodied in those sections, at least in the case of usufructuary mortgages, to this case ; but there are essential differences between the position of a Mahomedan widow entitled to dower, who, like the widow in the present case, enters upon her deceased husband's property lawfully and peaceably, and only claims to retain that possession till her dower-debt is satisfied, and the position and right of a mortgagee usufructuary or other to whom an owner pledges his property to secure the repayment of a debt. There is no real or true analogy between the two. It has been well said that there is nothing more misleading than a false analogy. Their Lordships are therefore of opinion that in a case such as the present it would be on their part rash, if, indeed, not unwise, to attempt to apply either the provisions of those sections of the Transfer of Property Act or the principles these sections embody to the widows.

It is now necessary to turn to the examination of the pleadings filed in the suit of 1902, and the issues raised by them, with the view of ascertaining what was the *res* adjudicated upon in that case, and what was the effect upon the properties or other interests of the parties of the dismissal of that suit, or the non-payment by the plaintiff to the widow of the sum found to be due to her.

In the plaint in that suit the plaintiffs claimed, amongst other things, that it should be held that the defendant No. 1, Maina Bibi, the widow, was in possession of her late husband's estate in lieu of her dower-debt, and that if any portion of that debt still remained to be recovered from the said estate, then a decree for the possession of the said estate might be passed in her favour upon the condition of the payment of

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such a proportionate amount of that debt as might properly be chargeable against their share of the property. Musammat Maina Bibi, in answer to this claim, filed her written statement on the 22nd May, 1902. She alleged, amongst other things : (1) that her dower-debt, still unpaid, amounted to the sum of Rs. 51,000 ; (2) that her deceased husband had during his lifetime given to her his entire immoveable property in lieu of her dower-debt and put her into possession and enjoyment of the same ; and (3) that since she had been so put into this possession of the said property she had, without any objection from the plaintiffs or others, continued to hold that possession, as she was by every means entitled to do until the amount of her dower-debt had been fully paid. On these pleadings, issues were framed by the Subordinate Judge. The second of those issues ran thus : Was the property in suit given by the deceased Muin-ud-din by way of gift to the defendant No. 1 in satisfaction of her dower, and, if so, is the gift binding on the plaintiffs ? His finding on this issue is to the effect that no evidence was offered by the defendant No. 1 on the point, although she had raised the plea in her written statement ; and that at the hearing the widow's pleaders accepted the finding arrived at in an earlier suit, in which she was defendant, that, she was, with the acquiescence of the heirs of her deceased husband, in possession of the property in suit in lieu of her dower.

On the first issue the Subordinate Judge found that the amount of the widow's dower was, in fact, Rs. 51,000, and that the plaintiffs in the suit had accepted that amount as accurate. These findings were not questioned on the appeal taken to the High Court ; but in subsequent litigation the widow persisted in putting forward the defence, thus practically abandoned and never proved, that a gift had been made to her by her deceased husband of all his property in lieu of her dower. No satisfactory evidence has ever been given to support it. In addition to the claims for relief already mentioned, the plaintiffs put forward the following :—

That—

(*b*) If it be held that defendant No. 1 is in possession (of the estate) in lieu of her dower-debt and that any portion of it is still to be recovered from the estate of Shaikh Muin-ud-din mentioned in lists 'A,' 'B' and 'C,' then a decree for possession may be passed on condition of payment of that proportionate amount of dower which may be charged against the plaintiff's share.

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"(c) A decree for mesne profits from November, 1890, to April, 1902, or for any amount which may be found due by the Court against defendant No. 1, may be passed in favour of the plaintiffs. It has presently been laid at Rs. 1,232 for payment of Court fee, but in case the amount exceeds the above a further Court fee will be duly paid.

"(d) *Mesne profits—pendente lite* and future till the date of possession together with interest and the costs of this suit and interest may be awarded to the plaintiffs against defendant No. 1.

"(e) Other necessary directions which may be deemed essential for justice to the plaintiffs may be given."

Upon these claims the Subordinate Judge arrived at the following findings :—

"25. If it be held that defendant No. 1 should render an account, then she is entitled to charge in that account interest at the rate of Re. 1 per cent. per mensem on the entire amount of the dower-debt, other debts, funeral expenses, cost of new construction and the amount spent on the repairs of the house.

"26. The claim for moveable property is time-barred.

"27. The claim for mesne profits is time-barred.

"28. The plaintiffs are not entitled to receive any mesne profits and the amount is excessive."

He took an account between the parties and came to the conclusion that the amount then due to Maina Bibi in respect of her dowers amounted, after making all just and proper deductions, to Rs. 25,387-6-5, and on the 23rd November, 1903, made a decree, the curial part of which runs as follows:

"It is ordered and decreed that the plaintiffs be put in possession of a seven-twelfth share of the property specified in lists 'A,' 'B' and 'C' mentioned above on condition that they pay to defendant No. 1 Rs. 25,387 within six months from the date of the decree, in case of non-payment of the said amount within the said time, the plaintiffs' claim be dismissed with costs.

"It is further ordered that defendants Nos. 1 and 4 do pay to the plaintiffs Rs. 659-8-0 on account of costs of this suit, which has been charged against them. And it is further ordered that in case the claim be dismissed the plaintiffs do pay Rs 290-13-9 to defendant No. 1 on account of the costs of this suit, which has been charged against them."

From this decree the plaintiffs appealed to the High Court of Allahabad. The appeal is numbered 6 of 1904. The grounds of appeal are stated to be—(1) that the Subordinate Judge should not have awarded interest to the first defendant as he did ; (2) that the profits of the property in suit up to the time fixed for payment should have been set off against the amount due ; (3) that the six months allowed for payment should have been directed to commence from the date of the decree becoming final. The appeal did not come on for hearing till the 3rd July, 1906. It was on that day dis-

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missed with costs. The decree of the Subordinate Judge was confirmed, but modified by the provision that the time for payment of the amount found to be due should be extended to the 3rd December, 1906. No payment has, in fact, ever been made by the plaintiffs or any of them in discharge of the sum awarded to the widow by this decree of the 28th November, 1903, and the suit in which it was made accordingly stood dismissed.

It is a suit in which the plaintiffs claimed to be entitled to proprietary possession of a 7|12th share in the property mentioned in the two lists attached to the plaint, they also claimed, in effect, to have been entitled to that possession, not only at the date of the plaint, but for the 18 months previous, because they claimed a decree for mesne profits from November, 1890, to April, 1892, which they would not otherwise have been entitled to, and also claimed mesne profits *pendente lite* and in the future till the date of possession. Their claim, therefore, is for immediate possession of this property. Their suit is a suit to recover that immediate possession, based upon the facts alleged in the 5th and 6th paragraphs of the plaint : (1) Namely that the only dower the widow was entitled to was *Fatimi* dower amounting to Rs. 107 , and (2) that the dower-debt had long previously been paid from the properties mentioned in the list A, B and C.

It is this claim to get immediate possession of the property in suit and this claim alone which has been dismissed, and yet it has been strenuously and ingeniously argued by Mr. de Gruyther that the right of the plaintiff to recover possession of this land at any time subsequent to the decree, or under any circumstances however changed is absolutely barred—in fact, that the right is lost for ever.

The plaintiffs themselves are willing that in the circumstances mentioned in the plaint a condition for payment should be attached to any claim that may be made. That, however, does not alter the matter. The condition actually attached to the decree might have been performed at any time up to the 3rd December, 1906. It is the dismissal, which comes into effective operation on that day, not before, that, it is urged, has barred for ever the claim of the plaintiffs to recover possession.

The Subordinate Judge has, in their Lordships' opinion, stated with perfect accuracy in the following passage of his

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judgment what was the legal effect upon the rights of the parties of the non-payment of the sum directed to be paid on the 3rd December, 1906. He said :—

"It is contended on behalf of the answering defendants that as the decree in the previous suit provided that the suit shall stand dismissed in the event of non-payment by the plaintiffs within the time fixed and that as the plaintiffs did not comply with that decree their proprietary right to the property claimed was extinguished and Musammat Maina Bibi became the absolute owner from the expiration of the period fixed for payment and that plaintiffs' claim is barred by the rule of *res judicata*. Having given my best consideration to that contention and to the various authorities cited on each side, I am unable to accept it as sound. The only interpretation which I can reasonably put on that decree is that it simply declared that if the plaintiffs wanted to have immediate possession of the property claimed, which Maina Bibi was entitled to hold till her dower-debt was satisfied, and discharged out of the usufruct or otherwise they must pay the amount found due to her by a certain date and that if they did not pay that sum they would not be entitled to immediate possession. The order of dismissal in the event of non-payment did not, I think, mean that if the plaintiffs failed to make the payment within the time fixed they would be deprived of their proprietary right to the property and of their right to recover the property when the dower-debt due to Maina Bibi should be discharged either out of the usufruct or by the plaintiffs at some future date. The effect of dismissal and the plaintiffs' failure to comply with the previous decree was simply that the parties were relegated to the position in which they were before that suit was brought."

The defence of *res judicata* is dealt with in S. 11 of the Code of Civil Procedure of 1908.

That section runs as follows :—

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

One asks oneself what was the *res* that was adjudicated upon, either on the 25th November, 1903, or in the Court of Appeal on the 3rd July, 1906? The things in dispute in the first case were, (1) the right of the plaintiffs to recover immediate possession of the land in suit; (2) the amount of dower; and (3) the rate of interest. The two latter matters have been decided in that suit and cannot be re-opened. The suit out of which this appeal arises only asks for an adjudication as to the account since 1903. The right to get immediate possession of land at the date when a suit to recover it is, in fact, instituted, is a wholly different thing, a wholly different *res*, from the right to recover it at some future time,

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and possibly under wholly altered circumstances. The non-fulfilment of the condition attached to the decree in the earlier suit only extinguished the right to recover immediate possession as actually claimed, and could not and did not, in their Lordships' opinion, extinguish the right of the plaintiffs to the inheritance of, or their rights to recover possession of, the lands at some future time. That fact prevents this section from applying. The matter in issue in the first suit was not directly and substantially raised in issue in the second, even if the provision as to the identity of the parties was satisfied.

In the deed of gift executed by Maina Bibi, dated the 18th March, 1907, the decree of the 3rd July, 1906, is recited. The non-payment by plaintiffs in the suit of 1902 of the sum found in that suit to be due, namely, Rs. 25,387-5-0, is also recited, and it is alleged that these plaintiffs have no longer any right to the estate of her husband, deceased, that the donees in that deed and the plaintiff in the last-mentioned suit were parties to the partition suit mentioned in the deed, and made no objections to it. Then follows a statement, purporting to be made on her behalf, running thus :—

"As they (*i. e.*, the plaintiffs) have not yet deposited the amount in the Court, they have no longer any right whatever to the property, and I, the executant, have in every way become an absolute owner of the property specified below, and I have up to this day been in proprietary possession and enjoyment thereof, without the participation and interference on the part of anyone else. Hence I, the executant, while in a sound state of mind and body, and while competent to exercise all necessary and lawful appropriations, have, of my own free will and accord, without compulsion, coercion and inducement on the part of anyone else voluntarily made a *hiba biltamlik* of the entire zamindari property specified below."

She bases her claim to absolute ownership of her husband's property, not as formerly on a gift from him *inter vivos*, but on the default of the plaintiffs in the suit of 1902 to pay the money directed to be paid by them to her. This is a wholly absurd claim. The deed of the 12th June, 1907, is as to this point substantially to the same effect as the former, and both are ineffective for the purposes apparently designed by those who framed them.

The present suit was commenced on the 22nd July, 1915, 9 years and 19 days after the date of the decree in the High Court in the first suit, namely, the 3rd July, 1906.

It was instituted by the three sons of Musammat Barkat-un-nissa, who was a cousin german of the deceased owner

Shaikh Muin-ud-din (and were therefore the latter's right heirs according to the Mahomedan Law), against Maina Bibi, the donees in the two deeds of 1907, and others.

The plaint contains a very lengthy and detailed statement of all the previous litigation between the party litigants, its results, and what the plaintiffs contend are their rights. The relief they now pray for runs as follows :—

That—

"The plaintiffs may, without paying any amount, be put in proprietary possession of the zamindari property specified in list (C) the share in suit of the houses specified in list (D) left by Muin-ud-din as against defendants Nos. 2 to 6.

"If the Court hold that the plaintiffs are not entitled to obtain possession without paying the remaining proportionate amount of dower-debt they may, as against defendants Nos. 2 to 6, be put in possession of the zamindari property specified in list (C) and the share in suit of the houses specified in list (D) conditional on their paying the amount which may, after deducting the profit of the property, be found under account to be payable by the plaintiffs.

"Costs of this suit may be awarded against contesting defendants."

One written statement in answer to this plaint was filed by defendants 1 to 5 and another by Chaudhri Muhamad Isa, one of the donees in the deed of 1907. In both of these statements it is admitted that this lady was, as an heir of her husband, entitled to one-quarter of his immoveable estate, and alleged that she was, and still continued to be, in possession of the entire of this estate in lieu of her dower-debt of Rs. 51,000. It is also admitted that the plaintiffs in the suit of 1902 failed to pay the sum awarded to the widow on or before the 3rd December, 1906, or, indeed, at all. Several of the pleas put forward were found by the Subordinate Judge to be quite unsustainable. The only pleas of any importance relied upon were (1) that the suit instituted in July, 1915, was barred by S. 11 of the Code of Civil Procedure, and (2) that the claim of the plaintiffs was barred under the provision of that statute by a lapse of 12 years between the date of the decree in the first suit and the commencement of the second suit.

These pleas have been already dealt with. They are, in their Lordships' view, quite unsustainable. It was contended, as their Lordships understood, that Musammat Maina Bibi had by the deeds of 1907 assigned both her dower-debt and her right to hold possession of her husband's estate until that debt was paid. It is doubtful whether she could have done either of these things, but however that may

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be, it is clear she, in fact, never purported or attempted to do either of them. On the contrary, in those deeds she describes herself as the absolute owner of the property of her deceased husband, and purports to convey that absolute ownership to her donees. There is no ground for the contention, if it has been really put forward, that because these deeds fail to effect a transfer of the absolute interest with which they purport to deal they operate to transfer the widow's dower-debt and her right to hold possession of the lands till that debt is paid. By giving up the possession of the lands, as in her deeds she alleges she has done, she has undoubtedly lost her right to hold the possession of them. Their Lordships express no opinion on the point whether her representatives may not be entitled to recover the unsatisfied balance of the dower-debt. If she has that right this judgment does not alter it or interfere with its exercise in any way.

She and her advisers have, in their Lordships' opinion, taken an entirely erroneous view of the effect of the non-payment by the plaintiff in the suit of 1902 the sum decreed to be due to her. That failure did not convert her into the absolute owner of the immoveable property of her deceased husband, of which she had been in possession, nor did it confer upon her any proprietary interest in it or any right to dispose of it. The judgment appealed from was, in their Lordships' opinion, for the above-mentioned reasons right, and should be affirmed, and this appeal be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellants : *Douglas Grant.*

Solicitor for respondents : *H. S. L. Polak.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Govindaswami Pillai ... *Appellant** (*Respondent—2nd Defendant*)

v.

Govinda Padayachi ... *Respondent* (*Petitioner—Attaching creditor*).

Govindaswami Pillai v. Govinda Padayachi.

Limitation Act of 1908, Art. 182—Step-in-aid of execution—Batta application if and when a—Application in effect asking for attachment—Effect.

*A A A O No. 21 of 1923. 7th January, 1925.

Govindaswami Pillai v. Govinda Padayachi.

A batta application was termed "Process Application," and it appeared from the application that the batta was paid "to attach the properties in the house of the defendants" and that it prayed that Re. 1 might be received for the said purpose. In the left-hand margin of the application were found the words "Order for attachment of moveables under O. 21, R. 43."

Held, that the application in effect asked for attachment and was a step-in-aid of execution.

Appeal against the appellate order of the District Court of East Tanjore at Negapatam in A. S. No. 359 of 1921 preferred against the order in E. P. No. 240 of 1921 in E. P. No. 4 of 1921 in O. S. No. 78 of 1916 on the file of the Court of the District Munsif of Mayavaram.

K. Bhashyam Aiyangar for appellant.

P. R. Srinivasa Aiyangar for respondent.

The Court delivered the following

JUDGMENT :—Defendant is the appellant. The question in this case is, whether the batta application, dated 18th September, 1918, is a step-in-aid of execution. The application is termed "Process Application" and it is to be seen from it that the batta is paid "to attach the properties in the house of the defendants" and "it is requested that Re. 1 may be received for the above purpose." In the left-hand margin of the application I find the words "Order for attachment of moveables under O. 21, R. 43." In these respects the application in this case is quite different from the one in *Arunachalam Chettiar* v. *Latchumanan Chettiar* (1) which appears on examination to have been a simple "batto memo." and nothing more. The decision in that case that such a memo. does not amount to a step-in-aid of execution cannot apply to this case. In my view there are sufficient indications in the process application to show that the applicant in effect asked for attachment. In this view the case is governed by *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (2). The decision in *Alagamuthu Pillai* v. *Devasagaya Fernandez* (3) to the effect that a batta memo. which mentions that batta is paid for the issue of notice to the judgment-debtor under S. 248, Civil Procedure Code, is an application to take a step-in-aid of execution may also be referred to in support of the contention that the process application in this case is a step-in-aid of execution. The Lower Court's order is therefore right and I dismiss this appeal against appellate order with costs.

A. S. V. *Appeal dismissed.*

1. (1924) 47 M L J 537.
2. (1905) I L R 28 M 399.
3. (1915) 3 L W 34.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Zubeda Begam Saheba ... *Petitioner** (*Petitioner in I. A. No. 752 of 1922 in O. S. No. 19 of 1922 on the file of the Subordinate Judge's Court of Vizagapatam*)

v.

Kommana Kanniah and others ... *Respondents* (*Respondents in do.*).

Zubeda Begam Saheba *v.* Kommana Kanniah.

Agency tracts—Properties in—Attachment before judgment of—Jurisdiction of British Court to order—Agency District Munsif—Attachment before judgment at instance of British Court situate outside Agency tracts—Jurisdiction—Agency Rules—Rules 22, 16, cl. (4) and 2 (4)—Effect.

Held, that the Subordinate Judge of Vizagapatam had no jurisdiction, in a suit for money pending before him, to attach before judgment properties which admittedly were in the Agency tracts over which his Court had no jurisdiction.

Rr. 22 and 16, cl. (4) of the Agency Rules do not confer the power on an Agency District Munsif of attaching properties before judgment at the instance of a British Court situate outside the Agency tracts. Such power is not conferred by R. 2, cl. (4) either.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Vizagapatam in I. A. No. 752 of 1922 in O. S. No. 19 of 1922.

S. Subramania Sastri for petitioner.

Y. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT :—This is an application to revise an order passed by the Subordinate Judge of Vizagapatam refusing to set aside an attachment before judgment of property, namely a house alleged to belong to the petitioner who is the wife of the 3rd respondent. The attachment order was passed in the following circumstances. Respondents 1 and 2 filed O. S. No. 19 of 1922 against respondents 3 and 4 for the recovery of Rs. 50,000 and obtained an order for attachment before judgment of the said property alleging it to belong to the 3rd respondent. The petitioner's case was that the house in question belonged to her and not to the 3rd respondent. The property is situate in what are known as the Agency tracts. The

*C R P No. 639 of 1923. 25th November, 1924.

Zubeda Begam Saheba v Kommana Kanniah.

Subordinate Judge of Vizagapatam in whose Court the application was made rejected the petition on the ground that the claim was not satisfactorily proved.

The only question raised in this revision petition is one of jurisdiction. It has been argued before us that the Subordinate Judge of Vizagapatam has no jurisdiction in a suit pending before him to attach before judgment properties which admittedly are in the Agency tracts over which his Court has no jurisdiction ; and in support of this argument strong reliance has been placed on a decision by the Privy Council in *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1). In that case a suit was brought under the Civil Procedure Code in the Court of the Subordinate Judge of Vizagapatam to enforce a mortgage of property, some of which were situate in the Agency tracts subject to the special jurisdiction of the Agency Courts, and a decree on the mortgage and for the sale of the mortgaged property was made by the Subordinate Judge and affirmed by the High Court. On appeal to the Privy Council it was held that, "so far as the decree was for the sale of the mortgaged property in the Scheduled District, the Courts had no jurisdiction to make it, " and the decree was, therefore, varied by deleting the order for sale so far as applicable to the lands situate within the Agency Districts. In our opinion, the reasoning adopted by their Lordships of the Privy Council in this case applies to the present case also. Their Lordships state : " The order for sale is made under sections of the Code of Civil Procedure which the Code itself says are not to apply to the Scheduled District. " In the case before us the property is situate in the Agency tracts and the order for attachment before judgment was made under the Civil Procedure Code which does not apply to such tracts. On the authority of the decision in *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1) it was held in *Perrazu* v. *Seetharamachandrarazu* (2) that an Agency Court was right in refusing to execute a decree sent to it for execution regarding the lands in the Agency tracts. The learned vakil for the respondents has not been able to advance any satisfactory reason why the principle enunciated in *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1) should not be applied in the present case also. The argu-

1. (1919) I L R 42 M 813 : 37 M L J 11 (P C).
2. (1922) 16 L W 669.

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ment that the order for attachment before judgment in this case was passed in a suit for money, while the order for sale in the Privy Council case was passed in a suit against property does not really affect the application of the principle "that the order was made under sections of the Code of Civil Procedure which the Code itself says are not to apply to the Scheduled Districts."

It has also been argued by the learned vakil for the appellant that there is no provision in the Agency rules to attach before judgment properties in the Agency tracts in a suit pending in a Court outside the Agency. In this connection our attention has been drawn to Rr. 22 and 16, cl. (4) of the Agency Rules. In our opinion, these rules do not confer the power on an Agency District Munsif of attaching properties before judgment at the instance of a British Court situate outside the Agency tracts. Nor do we think that such power was conferred upon him by R. 2, cl. (4), relied upon by the respondents.

Applying the principle of the Privy Council decision in *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1) we hold that the order of attachment before judgment passed by the learned Subordinate Judge is without jurisdiction and we set it aside accordingly. The petitioner will have her costs in this Court only.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Chennapragada Narayanamurthy ... *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council, represented by the Collector of Kistna ... *Respondent* (*Defendant*).

Chennapragada Narayanamurthy v Secretary of State for India.

Dharkast—Grantee of land on, under order of Tahsildar—Improvements effected by—Right to recover value of, on cancellation of Tahsildar's order in appeal—Transfer of Property Act, S. 51—Tahsildar's order obtained by help of Karnam—Effect.

Where the grantee of land on dharkast under an order of the Tahsildar paid the assessment which was collected from him in respect of the land and

*S A No. 685 of 1922. 12th December, 1924.

1. (1919) I L R 42 M 813 ; 37 M L J 11 (P C).

Chennapragada Narayanamurthy v. Secretary of State for India.

spent money in putting the same to good use without any knowledge of an appeal from the Tahsildar's order in which the grant to him was cancelled, *held,* that the grantee effected his improvements *bona fide* within the meaning of S. 51 of the Transfer of Property Act and that he was entitled to the value of such improvements.

Held, further, that the fact that the order of the Tahsildar was obtained by the help of the Karnam had no bearing on the question of *bona fides* in making the improvements.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Ellore in A. S. No. 123 of 1921 (A. S. No. 163 of 1921, Sub-Court, Ellore) preferred against the decree of the Court of the Principal District Munsif of Narasapur in O. S. No. 772 of 1918.

G. Lakshmanna and *V. Viyyanna* for appellant.

The Government Pleader for respondent.

The Court delivered the following

JUDGMENT :—The order of the Sub-Collector, Ex. E-1, was passed on the appeal of Melam Surayya and two others. The written statement of the defendant which was carelessly drafted produces the impression that the order was passed on revision. The appeal of Surayya and others was filed on 14th November, 1916, and, though it was more than 30 days from the date of the Tahsildar's order (10th October, 1916), the appellants stated that they heard of the order on 16th October, 1916, and so claimed that their appeal was within time. Mr. Lancashire called for a report on 18th April, 1917. I think it must be taken that he excused the delay, or, otherwise, he would not have called for a report and might have rejected the appeals as out of time. The Subordinate Judge is not clear as to whether the order of the Sub-Collector was passed on appeal or on revision. I have now sent for all the originals of Exs. C, D, E, etc., and am satisfied that the order was on appeal. The second appeal fails so far as the land is concerned.

As to the claim for the assessment Rs. 2-2-6, the Subordinate Judge is obviously in error. This does not relate to a case nor to damages for proceedings taken under the Revenue Recovery Act. It is for money had and received. No land having been ultimately granted to plaintiff, there was no assessment to pay. One is surprised that the Government filed a memorandum of objections in respect of this amount and wished to retain the money, as revenue, relating to a

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grant which has been cancelled. Anyhow I hold that this portion of the claim is not barred, and allow the appeal.

The plaintiff next claims that he is entitled to damages. He says that, relying on the grant by the Tahsildar on 10th October, 1916, seeing that assessment was collected from him on 4th December, 1916, he began to put the land to good use. He was expected to do so and he was entitled to do so. Half the fasli being nearly over, he must be diligent in putting the land to some use if his payment of assessment was not to turn out to be a mere waste of money. I cannot agree with the view of the Subordinate Judge that merely because one knows or is bound to know that the order of the Tahsildar is subject to appeal or revision, he is not entitled to damages. Ayling, J.'s judgment in *Devaramani Bhogappa* v. *Pedda Bhivaka Gour* (1) shows that a grantee, if he begins to make improvements after the grant is entitled to the value of the improvements. This is also clear from the judgment of Benson, J. in *Muthuveera Vandayan* v. *Secretary of State for India in Council* (2), which prevailed and which was confirmed in L. P. A. in *Muthuveera Vandayan* v. *Secretary of State for India in Council* (3), White, C. J. was for giving a higher relief and did not differ on this matter.

The amount of damages has not been found by the lower appellate Court and I can find it here to avoid a calling for a further finding.

The plaintiff has given no particulars of loss in the plaint. Nor did the defendant insist on having the particulars. The defendant merely put the plaintiff to proof. Issues were framed and on the second issue plaintiff adduced his evidence. He swore to spending Rs. 30 for casuarina plants. There is no cross-examination by the defendant. His fourth witness says he levelled the land and might have spent Rs. 25 or Rs.30. I believe the plaintiff and this witness but I take only the lower figure. In this case there is nothing to show that the plaintiff was aware of the appeal petitions of Melam Surayya on 14th November, 1916 or on 2nd March, 1917 or of the order of Sub-Collector on 18th April, 1917. Up to then, he had no reason to think that his title was in jeopardy. Having got an order on 10th October, 1916, and paid his assessment on 4th

1. (1915) M W N 148. 2. (1906) I L R 29 M 461.
3. (1906) I L R 30 M 270.

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December, 1916, he proceeded to put the land to use. The fact that the order of the Tahsildar, dated 10th October, 1916 was obtained by the help of the Karnam has no bearing on the question of *bona fides* in making the improvements. I therefore find that the plaintiff effected his improvements *bona fide* within the meaning of S. 51 of the Transfer of Property Act, *i. e.* in the belief that he was absolutely entitled to the land at the time. He was, as a matter of fact, so entitled and this is all that S. 51 means [vide *Moitheensa Rowther* v. *Apsa Bivi* (4), *Narayana Aiyar* v. *Sankaranarayana Aiyar* (5) and *American Baptist Foreign Mission Society* v. *Ammalanadhuni Pattabhiramayya* (6)].

I therefore award a decree to the plaintiff for Rs. 25 for damages.

The appellant will receive proportionate costs on the portion he has succeeded and pay proportionate costs on the portion in respect of which he has failed, throughout.

A. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Koppa Anki ... *Petitioner* (Defendant)*

v.

Ponnappalli Venkata Subbayya ... *Respondent (Plaintiff).*

Koppa Anki v. Ponnappalli Venkata Subbayya.

Provincial Small Cause Courts Act, Art. 31—Tenant holding over—Legal representative of—Suit to recover damages for use and occupation from—Small Cause Court—Jurisdiction.

Defendant's son was let into occupation of certain land as plaintiff's tenant for five years under a kabuliat. After expiry of the period of five years he continued a tenant holding over. He died and his mother, the defendant, continued to cultivate without any notice to quit or protest from the plaintiff for a number of faslis. In a suit by the plaintiff for damages for such use and occupation, the defendant challenged the plaintiff's title and set up title in herself.

Held, that the suit was for damages for use and occupation and not for rent on the footing of the kabuliat, and that, by virtue of Art. 31 of the

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*C R P No. 119 of 1923. 2nd February, 1925.

4. (1911) I L R 36 M 194 : 21 M L J 969.

5. (1914) 1 L W 369. 6. (1918) 48 I C 859.

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Provincial Small Cause Courts Act, the suit was not cognizable by a Court of Small Causes.

The legal representative of a tenant holding over is a mere trespasser; there is no contractual relationship between him and the landlord; and he, the legal representative, is not precluded from denying the title of the landlord.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Repalli at Tenali, dated 21st August, 1922, in S. C. S. No. 175 of 1922.

P. Satyanarayana Row for petitioner.

K. Kameswara Row for respondent.

The Court delivered the following

JUDGMENT :—The chief point in this Civil Revision Petition is whether the Lower Court had jurisdiction to try the suit as a Small Cause suit. The suit was by the plaintiff to recover damages for use and occupation of his land from the defendant. Defendant's son was let into occupation of the land as plaintiff's tenant for five years, under Ex. A. After expiry of Ex. A he continued a tenant holding over. He died and his mother, the defendant, continued to cultivate without any notice to quit or protest from the plaintiff for six faslis. Plaintiff sues for damages for such use and occupation for three faslis, the rest of the claim being time-barred.

The plaint is clearly on the footing that the claim is for such damages and not for rent on the footing of the kabuliat, Ex. A. Defendant argued that this is a suit which is prohibited by Art. 31 of the second schedule of the Provincial Small Cause Courts Act from being tried by a Small Cause Court. Plaintiff urges that this objection was not taken before the District Munsif. It is certainly taken in the defendant's written statement, and as the District Munsif has not put down in his judgment the points for determination, we are unable to conclude that the point was abandoned by the defendant.

This is not a suit in which the defendant came into possession by permission of the plaintiff or admits the plaintiff's title or is estopped from denying the plaintiff's title. The legal representative of a tenant holding over is a mere trespasser. [See *Vadapalli Narasimham* v. *Dropamraju Seetharamamurthy* (1)]. And in her written statement the

1. (1907) I L R 31 M 163 : 18 M L J 26.

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defendant definitely challenges the plaintiff's title and sets up title in herself. There is, therefore, no contractual relationship between the plaintiff and the defendant on the footing on which the suit is based, and the question of title cannot be avoided. Plaintiff has first of all to establish that he is the lawful owner of the land before he can sue for damages for use and occupation. It is true that the defendant pleads in the alternative payment of maktha cist to the plaintiff yearly but it is not the plaintiff's case that there was any kabuliat between himself and defendant on which such maktha became payable. Hence this is not a case similar to those in *Vira Pillai* v. *Rangaswami Pillai* (2) and *Subba Rao* v. *Sitaramayya* (3) in which the defendant had, in the first instance, entered on the land with the permission of the plaintiff or the plaintiff's predecessors-in-title and therefore the question of title was not in issue.

The present case, therefore, is one in which the defendant has received mesne profits under a claim of title and one who claims to be the rightful owner in seeking to recover the same after having an account taken of the mesne profits. This appears to us to be a case covered by the Full Bench decision in *Savarimuthu* v. *Aithurusu Rowther* (4) and not cognizable by the Court of Small Causes. The Lower Court, therefore, had no jurisdiction to try the case.

It is urged by the plaintiff that this is not a case in which we should interfere in revision because the defendant has not been prejudiced. To this we cannot agree. The Lower Court has ignored the issue of title and we cannot find that it was abandoned by the defendant. Plaintiff is not absolved from the duty of proving his title and defendant is prejudiced by the Court having so absolved him. We must therefore interfere and set aside the Lower Court's decree and remand the case for disposal on the Original Side of the Court. Costs up to date will abide the result.

A. S. V. *Decree set aside.*

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2. (1898) I L R 22 M 149.
3. (1900) I L R 24 M 118 : 11 M L J 26.
4. (1901) I L R 25 M 103 : 11 M L J 428 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Venkata Ramani Aiyar and another ... *Petitioners** (*Plaintiffs* 1 *and* 2)

v.

M. Narayanaswami Aiyar and others ... *Respondents* (*Defendants*).

Venkata Ramani Aiyar v Narayanarswami Aiyar.

Court Fees Act, S. 12—Applicability—Category of suit—Decision as to—Not final—Order as to Court-fee—Interference in revision with—High Court—Jurisdiction—Court Fees Act, S. 7, cl. 4 (c) ;Sch. II, Art. 17-A (1)—Applicability—Hindu Law—Joint family—Father and brother—Mortgage by—Suit by other members for a declaration of its invalidity as against them—Court-fee payable in.

A decision as to the category to which a suit belongs is not final under S. 12 of the Court Fees Act.

The High Court can interfere in revision with an order of the Court below regarding the Court-fee payable on the plaint before it.

Plaintiffs, who were members of an undivided Hindu family along with defendants 2 and 3, sued for a declaration that a mortgage executed by defendants 2 and 3 (the father and brother of plaintiffs) in favour of the 1st defendant was not supported by consideration and was not binding on them. On a question arising as to the Court-fee payable on the plaint, *held*, Court-fee was payable under Sch. II, Art. 17-A (1) of the Court Fees Act and not under S. 7, cl. 4 (*c*) thereof.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order, dated 25th March, 1924, of the Court of the Subordinate Judge of Tiruvalur in O. S. No. 12 of 1923.

K. S. Ramabhadra Aiyar and *K. S. Sankara Aiyar* for petitioners.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for respondents.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition raises the question of the correctness of the order of the Subordinate Judge regarding the Court-fee payable on the plaint before him. The plaintiffs have filed this suit in respect of a mortgage executed by defendants 2 and 3, that is, their father and brother respectively, in favour of the 1st defendant. The plaintiffs claim that they are members of an undivided Hindu

*C R P No. 293 of 1924. 1st September, 1924.

Venkata Ramani Aiyar v. Narayanaswami Aiyar.

family along with defendants 2 and 3, that the mortgage is not supported by consideration and that it is not binding upon them. The plaintiffs contend that Court-fee is payable under Sch. II, Art. 17-A (1) of the Court Fees Act, that is, that the plaint is filed to obtain a declaratory decree and no consequential relief is asked. On the other hand, the defendants urge that the suit falls within S. 7, cl. 4 (*c*) of the Court Fees Act ; in other words, that the plaintiffs seek to obtain a declaratory decree as well as consequential relief. The learned Subordinate Judge agreeing with the defendants' contention directed the plaintiffs to pay additional Court-fee.

A preliminary objection was raised by the defendants-respondents that the decision of the Lower Court is final under S. 12 of the Court Fees Act. This objection must be overruled as the question is concluded by the authority of *Lakshmi Amma* v. *Janamejayan Nambiar* (1) where it was held that a decision as to the category to which a suit or appeal belongs is not final.

The real question, therefore, to be decided is, whether the suit is governed by S. 7, cl. 4 (*c*) or by Sch. II, Art. 17-A (1). The answer must in my opinion depend upon the relief which the plaintiff prays for because Court-fee must be determined with reference to the prayer contained in the plaint. The plaintiffs here ask for a declaration that the mortgage is not supported by consideration and is not binding upon them. The learned Subordinate Judge thinks that the plaintiffs have asked, or perhaps he thinks ought to have asked, for not merely a declaration but also for consequential relief, namely, the setting aside of the document. Maclean, C. J. seems, with respect, to have stated the law correctly on this point in his judgment in *Zinnat-un-nissa Khatun* v. *Girindranath Mukherji* (2) : "The safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success." If this test is applied, the suit has been properly valued, and the order of the learned Subordinate Judge cannot be supported.

But the same result would follow although a different line of reasoning is adopted as has been done in *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (3),

1. (1894) 4 M L J 183 (F B). 2. (1903) I L R 30 C 788.
3. (1906) I L R 30 M 18.

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Arunachalam Chetti v. *Rangaswami Pillai* (4) and *Chathu Kutty Nair* v. *Chathu Kutty Nair* (5). The plaintiffs not being parties to the document it is settled law that they are not bound to get rid of it by having it actually cancelled. The first two of these three decisions lay down that the Courts must look at the substance of the plaint and not at the language of it, and if the plaintiff is bound to have the document set aside, the plaint must be treated as including a prayer for consequential relief ; but if it is not incumbent on the plaintiff to get rid of the document, the plaint must be treated as one for a declaration only. In the present case, the plaintiffs are not parties to the document in question and, even applying this test, the suit is merely one for declaration.

Were the matter *res integra,* I would base my decision on the principle accepted by the Calcutta High Court. It seems to me not logical to say that the relief is not properly valued because the plaint does not ask for an appropriate remedy. If the plaintiff is bound to ask both for a declaration and the setting aside of a document but prays merely for a declaration, in my opinion, the suit must be treated for purposes of Court-fees as one for declaration. It is not for the Court to say that the plaintiff should have framed his plaint differently, and, if he had done so, a higher Court-fee would become payable and therefore the plaint before the Court should be treated as containing a prayer which it does not in truth contain. If a plaintiff contents himself with asking for a declaration, whereas he ought to ask for a declaration and a consequential relief, the suit is liable to be dismissed not because of improper valuation of the suit, but because he infringes the provision of S. 42 of the Specific Relief Act which enacts that no Court shall give relief by way of a declaration where the plaintiff is able to seek further relief but omits to do so. It is unnecessary to pursue this matter further. The matter is concluded by authority and so far as the present point is concerned, whichever line of argument is accepted the same result follows.

Lastly, an objection was taken that the order having been made in the course of a suit is not liable to be revised by this Court. In similar cases the High Court exercised its

4. (1914) I L R 38 M 922 : 28 M L J 118 (F B).
5. (1923) 19 L W 249.

powers in revision and, in my opinion, rightly, and I overrule this objection.

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In the result, the Civil Revision Petition is allowed and the costs will be costs in the cause.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Sankaran *alias* Kunhunni Nambudripad and another ... *Appellants** (*Plaintiffs* 2 *and* 3)

v.

Vatakkiniyedath Kirangat Manakkal Sreedharan *alias* Anujan Nambudripad and others ... *Respondents* (*Defendants*).

Sankaran v. Sreedharan.

Malabar Law—Karnavan— Nambudri illom—Family karar restricting the powers of karnavan—Anandravans appointed managers of portions of the tarwad property—Suit by other members of the illom calling upon anandravan to account—Death of karnavan pending suit—Anandravan becoming karnavan—Suit, if maintainable—Agent—Liability to account before expiry of term of agency.

Under a family karar entered into among the members of a Nambudri illom in Malabar, the first plaintiff, who was the *de jure* karnavan, gave up practically all his rights as such, retaining only certain privileges. The first defendant, who was then the senior anandravan, was appointed manager of one set of the family properties, and the third plaintiff, manager of another set of properties. The karar provided in detail for the various acts of management and for the succession to the managership. After the first defendant had been in management for some time, the first plaintiff and the second and third plaintiffs, who were the only other members of the illom brought a suit for a declaration that the first defendant having broken the terms of the karar, was not entitled to manage and for an account and various other reliefs. Pending the suit the first plaintiff died and the first defendant became the karnavan of the illom. The Court below held that inasmuch as the first defendant had succeeded to all the rights of a karnavan, the effect of allowing the suit to continue would be to remove him from the karnavanship and as that was not the plaintiff's original case, the suit must abate.

Held, reversing the decision of the Court below, that the suit was maintainable. Under the terms of the karar the first defendant, who was then the anandravan, had agreed to have his rights as karnavan restricted when he succeeded to the office and such an arrangement was binding and effective. The suit related not to the management of the first defendant as *de jure* karnavan but as manager of a set of tarwad properties under the karar and since he could not sue to recover property from himself and for his own removal from office, it was open to the plaintiffs, the only other adult members of the illom, to maintain the suit in question.

*Appeal No. 218 of 1923. 5th November, 1924.

Sankaran v. Sreedharan.

Even apart from the karar, the first defendant was liable for his conduct as anandravan and the mere fact of his becoming a karnavan would not do away with his responsibility for his previous acts of mismanagement.

An agent who is bound to render accounts at the end of a year is not absolved from liability for the acts committed in the course of that year, and, even if he is dismissed before the time arrives for the rendering of accounts, he would have to make good any misappropriations and, in doing so, the Court would call upon him to render an account to ascertain the extent of liability.

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in O. S. No. 76 of 1919.

C. V. Anantakrishna Aiyar and *P. S. Narayanaswami Aiyar* for appellants.

T. R. Ramachandra Aiyar, C. S. Swaminadhan and *P. S. Ramachandra Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The parties in this suit are members of a Nambudri illom in Malabar. The 1st plaintiff was the *de jure* karnavan and the other parties are anandravans. In 1918 the family entered into a karar which is filed as Ex. I and in this karar provision was made for the management of the illom. The 1st plaintiff, the *de jure* karnavan, gave up practically all his rights as such, retaining only certain privileges. The 1st defendant, who was then the senior anandravan, was appointed manager of one set of properties and the 3rd plaintiff was appointed manager of another set of properties. The karar is a very long document and provides in detail for the various acts of management and for the succession to the managership. After the 1st defendant had been managing the properties allotted to him for some time, the 1st plaintiff and plaintiffs 2 and 3, who were the only other adult males in the illom were dissatisfied with him and called upon him to explain his conduct. He failed to do so and accordingly the plaintiffs sent him a registered notice informing him that he was dismissed from his office. This was in accordance with the procedure laid down in paragraph 25 of the karar. The 1st defendant was still obstructive and accordingly this suit was brought for a declaration that he was no longer entitled to manage and for an account and various other reliefs. After the suit was filed the 1st plaintiff died and the 1st defendant became the karnavan of the illom. Plaintiffs 2 and 3 wished to go on with the suit representing that the cause of action survived to them, but

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the 1st defendant contended that the suit must abate inasmuch as he was karnavan and the legal representative of the 1st plaintiff and that his rights as karnavan were not affected by the conditions in the karar and that no suit would lie. The Subordinate Judge has accepted the contention of the 1st defendant and has held that inasmuch as he has succeeded to all the rights of a karnavan, the practical effect of allowing the suit to continue would be to remove him from his karnavasthanam, and as that is not the original plaintiffs' case the suit must abate.

It is argued in appeal that, as a matter of fact, the 1st defendant has not got the full rights of a karnavan because, he, being a party to the karar, is bound by the terms of it and has by that karar renounced his right to become a karnavan in the ordinary acceptation of the term. It is not disputed and it was laid down by a Full Bench in *Kenath Puthen Veettil Tavazhi* v. *Narayanan* (1) that a karnavan can renounce his rights. In that case an anandravan under family karar agreed to have his rights as karnavan restricted when he succeeded to the office and it was held that such an agreement was effective. A number of other cases have been cited on this point and this principle has never been disputed, but it has been laid down that such a renunciation must be clearly expressed in the karar. In a case in *Krishnan Kidavu* v. *Raman* (2) relied on by respondents on the terms of the karar in question there, it was held that there was no renunciation ; but every case must be determined on its own facts and here we have to consider what is the meaning of the karar, Ex. I. The 1st defendant in so many words does not say that he gives up his rights ; but he is a party to all the conditions contained in the karar, and one of these is that the karar shall be in force until it is set aside by means of a registered document executed by all the adult members together. Admittedly that other document has not been executed and *prima facie* the karar would still be in force. It is, however, argued for the 1st respondent that the karar was not intended to have any force after the death of the 1st plaintiff, the then *de jure* karnavan. It is, however, significant that in paragraph 15 there is a provision that the document shall be in the name of the karnavan "for the time being," which clearly contemplates the death of the present karnavan

1. (1904) I L R 28 M 182 : 14 M L J 415 (F B).
2. (1915) I L R 39 M 918.

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and the succession of somebody else. Again in paragraph 20 there is a provision that both the present and future karnavans shall do so and so. Here again it is obvious that the acceptance of the karar contemplated its continuing in force after the lifetime of the then karnavan, the 1st plaintiff. Again there is a provision in cl. 26 which runs as follows : "At also the death of the members who are managers, new members shall be appointed for management in accordance with the consent of the majority ; at change of persons or change of office (*sthanam*) all matters shall be conducted in accordance with the karar." The word translated as 'office' is '*sthanam,*' and it is contended for the appellants that this refers to karnavasthanam inasmuch as there is no particular '*sthanam*' or estate attached to this illom and it cannot refer to a *sthanam* in that sense. On the other side it is contended that it merely means the office of manager of the two sets of properties mentioned in the karar. Those managers are referred to in the first sentence of cl. 26 and the word used is not '*sthanam.*' Similarly if it is to be interpreted as office of manager, the recital "at the change of persons," (*viz.*, the persons who are managers), "or the change of office," (*viz.*, the office of manager) is tautological and it seems unlikely that that can be the meaning. Whether we say that it refers to karnavasthanam or anandravasthanam it does not make much difference, because when the karnavan died there is a change in the karnavasthanam, and one anandravan loses his anandravasthanam and becomes a karnavan. The word '*sthanam*' seems quite applicable if interpreted in this sense ; and taking all the recitals in the karar together, especially paragraphs 15 and 20, and the last part of paragraph 26, it certainly seems as if the karar was intended to have effect not only during the lifetime of the 1st plaintiff but also until all these executants chose to put an end to it by executing another karar. If it is so, and we think it is, the 1st defendant clearly renounced his right to become karnavan with unrestricted powers. In that view, he is not necessarily the only representative of the 1st plaintiff. He is the *de jure* karnavan but this suit does not relate to his acts as such but as manager of one of the two sets of properties or '*sthalams*' as they are called. Ordinarily the karnavan ought to bring a suit for the recovery of tarwad property and it has been held that an anandravan cannot sue unless the karnavan is

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under some disability such as cases where he has himself alienated the tarwad property [vide *Cheria Pangi Achan* v. *Unnalachan* (3) on which the Lower Court relies]. Here there is a very clear disability in the case of the 1st defendant, for he would be bringing a suit to recover property from himself and for his own removal from office, and this is clearly impossible. The only other persons that can sue are the other members of the illom, and the only adult members are plaintiffs 2 and 3 ; the suit is therefore maintainable by them.

The Subordinate Judge does not seem to have considered whether, apart from the karar, the suit would not lie. The 1st defendant is charged with misconduct as an anandravan and the fact that he has become karnavan since he misconducted himself cannot absolve him from his liability for such misconduct. The mere fact of becoming a karnavan cannot do away with his responsibility for all his previous acts. He as an anandravan is liable, if the plaint allegations are true, to make good certain property to the tarwad. It may be that that property will have to be handed over into his own hands as karnavan but it will be handed over to him on behalf of the tarwad. He is liable to the tarwad and it is on that account that he is sued. It is contended on his behalf that any suit brought by the illom must be brought within the provisions of cl. 18 of the karar which provides that it must be brought by the manager of each '*sthalam*' and the karnavan conjointly. That clearly refers to suits by the illom against third parties, and cannot refer to suits between the parties based on breaches of the karar itself. The further contention that there is no cause of action against the 1st defendant and that the suit is premature because not having been in office for one year, he is not bound by the karar to render accounts, cannot possibly be sustained. An agent who is bound to render accounts at the end of a year is not absolved from liability for the acts committed in the course of that year, and, even if he is dismissed before the time arrives for the rendering of accounts, he would have to make good any misappropriations, and, in doing so, the Court would call upon him to render an account to ascertain what they were. In this view also, so far as certain of the prayers in the plaint are concerned, the suit would be maintainable.

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3. (1916) 32 M L J 323.

Sankaran v. Sreedharan.

The appeal is accordingly allowed and the suit remanded for disposal on the merits. The 1st respondent will pay the appellants' costs of this appeal. The Court-fee will be refunded.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

A. Palaniyappa Chettiar ... *Petitioner* (1st respondent)*

v.

K. N. Krishnaswami Chettiar and others ... *Respondents (Petitioners 1 and 2 and respondents 2 and 3).*

Palaniyappa Chettiar v. Krishnaswami Chettiar.

Madras District Municipalities Act V of 1920—Election—Setting aside—Breach of election rules—Setting aside on ground of—Condition—Result of election being materially affected by breach—Meaning—Order of Lower Court setting aside election without considering whether result of election has been materially affected and without any evidence to that effect—Revision—Interference—S. 49—Officer of Municipality—Vice-Chairman if an—R. 32 of Election Rules—Applicability of.

A breach of the Election Rules framed under the Madras District Municipalities Act V of 1920 will not in itself justify an Election Court holding that the election is invalid and must be set aside. It has to be further proved that that breach of the rules materially affected the result of the election.

The petition out of which the revision arose was to set aside the election of the petitioner for a ward in the Erode Municipality. The Lower Court found that the petitioner, who was the Vice-Chairman of the Municipality, and was acting as Chairman during the temporary absence of the Chairman, had broken R. 32 of the rules for the conduct of elections of Municipal Councillors in that he, in the matter of the nomination of candidates for the vacancy in that ward, had himself scrutinised and passed his own nomination paper. It held that, as there was a breach of the rules, the nomination was therefore invalid and that an election comprising an invalid nomination was itself invalid and its result was therefore materially affected. It did not consider whether, assuming that R. 32 had not been broken and the nomination proceedings had been conducted by the proper authority properly constituted under R. 32, the result, namely, the petitioner's nomination, would have been different.

Held, that the Lower Court had not put to itself the real question and had not looked at the question from the right point of view, and that, as there was no evidence on which it could record a finding that the breach of the rules had materially affected the result of the election, the case was one for interference under S. 115, Civil Procedure Code.

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*C R P No. 526 of 1924. 7th January, 1925.

Test to find out whether the result of the election has been materially affected by a breach of the election rules.

The Vice-Chairman of a Municipality is not an "officer" of the Municipality within the meaning of S. 49 of the District Municipalities Act; and a Vice-Chairman may himself be a candidate for a ward while he is Vice-Chairman.

The application of R. 32 is not confined to cases in which there is no Chairman appointed at all. The rule applies when there is no *Chairman in charge,* that is, when there is an appointed Chairman but he is temporarily absent.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order dated 4th July, 1924 of the Court of the Subordinate Judge of Coimbatore in O. P. No. 7 of 1924.

T. R. Ramachandra Aiyar and *S. S. Ramachandra Aiyar* for petitioner.

T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar and *K. Periaswami Goundan* for respondents.

The Court delivered the following

JUDGMENT :—The petitioner asks this Court to set aside the order of the Lower Court in O. P. No. 7 of 1924 on its file. That was a petition under the Election Rules framed under the Madras District Municipalities Act V of 1920 to set aside the election of the present petitioner held on 11th February, 1924 for a ward in the Erode Municipality, and for other incidental reliefs.

The Lower Court found that the petitioner, who was the Vice-Chairman of the Municipality and was acting as Chairman during the temporary absence of the Chairman, had broken R. 32 of the Rules for the conduct of elections of Municipal Councillors in that he, in the matter of the nomination of candidates for the vacancy in this ward, had himself scrutinised and passed his own nomination paper. Whether in thus holding that there was a breach of Rule 32 he did find at all or did properly find that this violation had materially affected the result of the election and therefore he had jurisdiction to set aside the election, is the chief point argued before us.

At one stage in its order the Lower Court seems to hold that the mere breach of the rule itself rendered the election void and, therefore, "there is no need to consider whether the result of the election was materially affected". Later on

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it holds that, as the result of the petitioner's breach of the rules was that voters voted for a candidate who was not validly nominated, the result of the election was materially affected. The two findings seem different aspects of the same conclusion rather than two different conclusions.

One of us, Wallace, J. has already held in a case reported in *Ahmad Thambi Maracayar* v. *Basava Maracayar* (1) that a breach of the election rules will not in itself justify an Election Court holding that the election is invalid and must be set aside. It has to be further proved that that breach of the rules materially affected the result of the election. That follows from the plain words of Rule 11 of the "rules for decision of disputes as to the validity of an election". We have heard nothing now in the argument to induce us to modify that opinion. It does not then follow that a breach of the rules regarding this nomination *ipso facto* renders void or invalid the election carried through by means of such a breach. There is no rule which says so and if a breach of any such rule automatically carried with it the invalidity of a nomination or candidature so that the election following thereon would be invalid also, R. 11 is a superfluous rule. The result of the election, therefore, must be affected in some other way than by the mere breach of the rule, that is, the breach must in itself have resulted in and produced some other result which has in itself the effect of invalidating a candidature or a nomination or an election ; as, for example, the breach must have resulted in the candidature of some one incompetent to stand or the nomination of some one who could not be validly nominated. The real question, therefore, which the Lower Court had to put to itself was, supposing that the rule now found to have been broken had not been broken and the nomination proceedings had been conducted by the proper authority properly constituted under R. 32, would the result, namely, the petitioner's nomination, have been different ? Would the petitioner's nomination have been invalid either because he was incompetent to stand for election at all or because his nomination paper was in some way defective, or would the result have been just what it was, namely, that the petitioner's nomination was invalid and his candidature proper ? If the latter, we find it impossible to hold that the result of the election was materially affected by the breach

1. (1922) I L R 46 M 123 : 44 M L J 69.

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of the rules. We are clear also that the Lower Court has not looked at the case from this point of view. It has simply held that as there was a breach of the rules, therefore the nomination was invalid and therefore an election comprising an invalid nomination was itself invalid and its result was therefore materially affected.

The next point is whether this failure of the Lower Court to look at the question from the right point of view is a mere question of an erroneous interpretation of R. 11 on which that Court has jurisdiction to come to a wrong as well as a right interpretation, or is a matter of the exercise of jurisdiction with material irregularity so as to give this Court jurisdiction to interfere under S. 115 of the Civil Procedure Code. It appears to us that this is a case where there was no evidence before the Lower Court on which it could come to a finding that the result of the election had been materially affected. The evidence before it was only on the question whether the rules had been broken and the Court found that the rules had been broken. It has really not proceeded further than that, and there was no evidence before it to justify any further finding. The Lower Court's finding, therefore, that the result was affected was a finding based on no evidence and contrary to R. 11, and it has, therefore, exercised its jurisdiction with material irregularity. This case appears to us one really of the same complexion as *Ahmad Thambi Maracayar* v. *Basava Maracayar* (1).

We are not impressed with the argument of respondents that the general principle of law that a man shall not be a judge of his own cause should be applied and will, if applied, lead to the result that the Vice-Chairman's proceedings are wholly illegal and invalid and, therefore, the whole election is invalid. That is to introduce a principle at variance with R. 11. We are not also clear why this salutary principle should punish the innocent with the guilty and invalidate nominations of other candidates than the Vice-Chairman's equally with the Vice-Chairman's himself. It was obviously to prevent such untoward results that R. 11 was enacted.

The respondents have contended that by force of S. 49 of the Madras District Municipalities Act the Vice-Chairman is incompetent to stand for election because he is an " officer " of the Municipality, and the Lower Court in a sort of aside

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1. (1922) I L R 46 M 123 : 44 M L J 69.

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in paragraph 12 of its order seems to accept this contention. It is not very clear whether it considers its finding on this point was sufficient to justify a conclusion that the result of the election had been materially affected ; but even if it did, we think here also it has erred in jurisdiction. Its inference no doubt will be correct in law if the Vice-Chairman were an "officer" of the Municipality within the meaning of S. 49, but it is quite clear that he is not. R. 32 itself clearly contemplates that the Vice-Chairman may himself be a candidate for a ward while he is Vice-Chairman ; and so may the Chairman. S. 12, sub-section 5 of the Act would also imply that it is not necessary for the Chairman or Vice-Chairman to resign their posts before they can stand for election as councillors. This again is not a case of a mere mistake in interpretation of S. 49. It is the question of whether the Vice-Chairman is or is not within the meaning of the word "officer" in that section, and, as we have already pointed out, S. 32 itself makes that point quite clear and the Lower Court cannot legally base its finding that there has been a breach of R. 32 on the ground which R. 32 itself contradicts. The rule must be accepted or rejected in its entirety.

The Lower Court has found also that the rule directing that four days' notice of the poll should be given has been violated. But there was no evidence before it that this violation has affected the result of the election. The Lower Court has not, in fact, recorded any finding that this violation of the rules affected the result of the election, nor has it set aside the election because of its finding on this fact. Its order, therefore, setting aside the election is not based on this finding.

The petitioner has argued that R. 32 does not apply at all when there is a Chairman appointed but he is temporarily absent. He contends that the rule applies only when there is no Chairman appointed at all. But it is quite a plausible and reasonable interpretation of R. 32 that it applies when there is no *Chairman in charge,* that is, when there is an appointed Chairman but he is temporarily absent. In any case, we consider that this point is a mere matter of the interpretation of this particular rule, and, unless that interpretation was unreasonable or perverse, or a mere erroneous interpretation by the Lower Court it is a matter quite within its jurisdiction and would not amount to material irregularity in the exercise of jurisdiction. We are not prepared to hold

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that the Lower Court in so interpreting R. 32 exercised its jurisdiction with material irregularity.

However, as we find, for reasons already given, that the Lower Court has not really decided the question whether the result of the election was materially affected, the Lower Court's order cannot be supported and must be set aside and the case sent back to it to be re-heard in the light of the remarks that we have made above as to whether the result of the election has been materially affected by the breach of the rules which it finds did occur. We order accordingly and direct the costs to abide the result.

This disposes also of the Memorandum of Objections.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Annamdevula Thata *alias* Venkatarayudu and others ... *Appellants** (*Defendants*)

v.

Khan Saheb Khwaja Ahamadulla Khan Saheb Bahadur and another ... *Respondents in all the appeals* (*Plaintiffs in all*).

Annamdevula Thata v. Khwaja Ahamadulla Khan Saheb Bahadur.

Ryotwari lands—Occupancy rights—Plea of—Burden of proof—Term leases—Express clause to surrender—Alienations only recent—Change of tenants—Enhancement—Suit for damages for use and occupation—If of a small cause nature—Second appeal—Civil Procedure Code, S. 102.

In a suit by a landlord of ryotwari villages for damages for use and occupation on the footing that the defendants were holding over and were trespassers in the eye of the law, the latter pleaded that they had occupancy rights. *Held,* the burden of proof lay on them. *Seturatnam Aiyar* v. *Venkatachala Goundan,* I L R 43 M 567 (P C) and *Naina Pillai Maracayar* v. *Ramanathan Chettiar,* I L R 47 M 337 (P C) followed.

Where the evidence in the case showed that the defendants-tenants were holding under muchilikas for terms of years and had expressly undertaken to surrender the lands at the end of the term, that there were constant changes of tenants and enhancement of rent, and though there were alienations by tenants they were all of a recent date, a Court of Law is entitled to find against the existence of occupancy rights. Case-law referred to.

Obiter : Such a suit for damages for use and occupation is one of a small cause nature and where the valuation is less than Rs 500, there is no right of second appeal.

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*S A Nos. 593 to 600 and 1459 to 1466 of 1923. 3rd December, 1924.

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Second appeals against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. Nos. 51, 49, 52, 53 and 56 of 1922 and against the decree of the Court of the Additional Subordinate Judge of Rajahmundry in A. S. Nos. 17, 14 and 15 of 1920, preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in O. S. Nos. 121, 114, 123, 129, 118, 115 and 116 of 1918 respectively.

A. Krishnaswami Aiyar and *V. Viyyanna* for appellants.

C. V. Anantakrishna Aiyar and *C. Rama Rao* for respondents.

The Court delivered the following

JUDGMENT :—These Second Appeals arise out of a batch of suits filed to recover damages for use and occupation in respect of the two villages of Kadiam and Jagurupad in the Godavari District. The Courts below gave decrees in favour of plaintiff and the defendants file these appeals.

The two villages, though situate within the ambit of the Zamindari of Pittapore, had a history of their own apart from the Zamindari. They were granted in Fasli 1158 (or 1748) by or on behalf of Asoof Jan *alias* Nizam-ul-mulk, the first Nizam of Hyderabad. They were regarded as excluded from the assets of the Zamindari at the time of the Permanent Settlement in 1802 and continued to be held by the grantee's successors as inam. In 1856, they were resumed by the Government for reasons not clear but not material. Thus, they did not get the benefit of the Inam Settlement in 1862 but continued to be held by the grantees on ryotwari tenure. The defendants or their predecessors were the tenants of the villages. In 1900, the assessment payable to Government was enhanced as a result of the re-survey and re-settlement in which the plaintiffs were regarded as the pattadars of the villages. No rents were admittedly collected from the tenants from 1906 to 1910. In 1910, notices to quit were issued to the tenants but in vain. In 1917, the present suits were filed for damages for use and occupation on the footing that the defendants were holding over and are trespassers in law.

The defendants pleaded that they had permanent occupancy rights, that they were not trespassers and therefore are not liable to pay damages (as opposed to rent). They also

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pleaded that, as they did not pay rents for 19 years, the suits are barred by limitation. They admitted the payment of assessment due to Government. This must be presumably on behalf of the pattadar.

On second appeal, objection has been taken by the respondent, that, in some of the second appeals—those in which the value did not exceed Rs. 500—no second appeals lie. It is unnecessary to decide the point, though we think the objection is well founded. It is admitted that the objection cannot apply to all the cases and the merits must be gone into.

The only point practically argued in second appeals is, that the trial of the suits relating to Jagurupad has been seriously prejudiced by their being consolidated with the suits relating to Kadiam, that there is substantial difference between the two villages in the matter of the relations between the landlord and tenants and the Courts below were prejudiced by the facts relating to Kadiam which, it is admitted, are more favourable to the landlord in certain respects. We say this is the only point argued, for, all other points discussed in argument are subsidiary to and illustrative of this. As to Kadiam, no doubt the appellants argued that they have acquired a title by adverse possession but we do not think this argument is tenable in view of the points taken up in the written statements. The suits relating to Jagurupad are three in number, and their second appeals are S. A. Nos. 593, 596 and 597, and the vakil for the appellants has strenuously argued that these second appeals should be sent back for fresh findings. Before this point is dealt with, it will be convenient to state the fact and findings about both the villages and dispose of the other second appeals.

The Courts below held that, as the suit villages are ryotwari villages, the burden of making out occupancy rights lay on the appellants relying on *Seturatnam Aiyar* v. *Venkatachala Goundan* (1). In this connection *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (2) may also be mentioned as laying down (page 344) : " It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. "

1. (1919) I L R 43 M 567 : 38 M L J 476 (P C).
2. (1923) I L R 47 M 337 : 46 M L J 546 (P C).

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This is not denied for the appellants. The Courts below found that Kadiam lands were being held under muchilikas for terms of years—X series of 1875, N series of 1886, M series of 1891. The last set of muchilikas covered the period terminating with June, 1896. In all these muchilikas the tenants undertook to surrender the lands at the end of the term and must therefore be considered as re-admitted as tenants under the next succeeding set of muchilikas. They also found that there was constant change of tenants in the village of Kadiam and that there were also enhancements of rents. The District Munsif found that rents continued to be paid by the tenants after 1896 up to 1906, in respect of both the villages. But the Subordinate Judge found that the payment of rents has been practically proved up to 1900 only. We allowed reference to the documents and evidence in detail to see if there is any misconstruction of a document or a misstatement of fact by the Lower Appellate Court. But none has been established. The tenants latterly began to alienate the holdings but it was found these were all after 1900. They are sixteen in number for Kadiam and of the years 1902-1906 except one in 1912. As to Jagurupad, they were five in number and are of the years 1902, 1905-1907. Some improvements said to have been effected by the tenants were also stated and considered by the Courts below. After stating the facts common to all the cases, the District Munsif stated the facts proved in respect of each case separately, and the Subordinate Judge has not re-stated them as it would be only a repetition. On the facts summarised as above, they found that no rights of occupancy have been made out by the ryots. The vakil for the appellants argued that the facts are similar to those in *Seturatnam Aiyar* v. *Venkatachala Goundan* (1), more particularly in Jagurupad. We do not agree with him. In that case there were forty-three alienations found ranging from 1859-1896—as opposed to the much smaller number in the present cases which are all after 1900—when the Government enhanced the assessment and consequently the landlord neglected the collection of rents. The Courts below have considered all the circumstances that may be relied on in favour of the tenants and have come to the conclusion on a question of fact with which there is not the faintest shadow of justification for interference. In parti-

1. (1919) I L R 43 M 567 : 38 M L J 476 (P C).
2. (1923) I L R 47 M 337 : 46 M L J 546 (P C).

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cular, the effect of the muchilikas of Kadiam containing a clause that the tenant shall surrender at the end of the term may be stated—a fact totally absent in *Seturatnam Aiyar* v. *Venkatachala Goundan* (1). In *Suryanarayana* v. *Pattanna* (3) Sir John Edge stated (at page 1016) : " By these documents of tenancy the defendants or their predecessors-in-title agreed with the inamdars to quit possession of their holdings on the determination of the term for which the lands were let to them and without claiming any jeroyati right in the lands. " At page 1021 : " By the muchilikas which were executed by the defendants respectively or their predecessors-in-title the term for which the lands were let to them was specified ; it was admitted that they held no jeroyati rights and they agreed to quit the lands at the end of their term........It has not been proved that, when these tenancy agreements were entered into and the defendants or their predecessors-in-title were let into possession under them, any of the lands were or had been held by a ryot with a permanent right of occupancy. " In *Venkata Sastrulu* v. *Seetharamudu* (4), Viscount Cave observed (page 170) : " Each of these agreements contained a declaration by the tenant to the effect that except the right of cultivating the land for a year under the agreement he had no other right whatever thereto and accordingly that he agreed to the landlord (the plaintiff) taking possession of the land at the end of the year of tenancy without any relinquishment by the tenant. " At page 173 : " When the defendants were admitted as tenants, they severally declared (as stated above) that they had no right of occupancy except such as was given to them by the tenancy agreements. " In *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (2) it was observed at page 354 : " In 1831 some of the tenants of the temple's endowed lands, apparently all of them, agreed amongst themselves to cultivate jointly the endowed lands of which they were tenants, and they executed and delivered to the Collector, who was then the manager of the temple and its endowments, a muchilika, by which they took the endowed lands for a term from Fasli 1241. That muchilika is absolutely inconsistent with any of the tenants having then any right of permanent occupancy in any of the endowed lands of

1. (1919) I L R 43 M 567 : 38 M L J 476 (P C)
2. (1923) I L R 47 M 337 : 46 M L J 546 (P C).
3. (1918) I L R 41 M 1012 : 36 M L J 585. (P C).
4. (1919) I L R 43 M 166 : 37 M L J 42 (P C).

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the temple and with their believing that they had any right of permanent occupancy in any of the temple's lands. "In 1870 Sir C. H. Scotland, C. J. held that when a tenancy in the Presidency of Madras commenced under a terminable contract there was nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him," thus approving of *Chockalinga Pillai's case* (5), which is thus still good law except where abrogated by Legislature (I of 1908) as to lands in estates.

We are of opinion the appellants have no case as to Kadiam lands and the Kadiam appeals fail and are dismissed with costs.

It is argued as to Jagurupad that the facts are different, that there were no term muchilikas, that there was only one muchilika (R) in 1864, and that a summary suit against the tenants in 1869 for acceptance of a tendered muchilika failed as is seen in Exs. F and IV. These facts have been stated by the Courts below, who also find that, nevertheless the tenants continued to pay rents till 1900, that there were enhancements in 1883, that the original two families who held in 1864 became three families in 1869. In 1874, another family was added (Ex. 21) and a fifth family (Ganesula) has since been added. The District Munsif recorded all the evidence in one suit on the agreement of the parties, though later on it was objected to. In his judgment (paragraph 24) he says: "In addition to what has been discussed above, I consider it proper to examine in detail the facts relating to each case to afford no room to suppose that the case of any individual defendant is prejudiced by joint trial." In paragraph 43, he states the facts relating to Jagurupad separately. The Subordinate Judge takes up Jagurupad separately in paragraph 19 and states all its facts separately until towards the end of the paragraph where the facts common to both the villages were re-stated for Jagurupad. In paragraph 20 the alienations have been separately grouped for both the villages. In paragraph 21 the improvements were stated and the only evidence expressly referred to related to Jagurupad and it was held that the building of small cattle-sheds and granaries cannot be accepted as acts indicative of rights of permanent occupancy. It seems to us that not only are all facts and circumstances in favour of the tenants have

5. (1870) 6 M H C R 164.

been stated and considered by the Courts below but every possible effort has been made to make it clear that the facts of the two villages have been kept separate in their minds. It is impossible to hold that the defendants suffered the smallest prejudice by the joint trial. It is true that in Jagurupad there are no term muchilikas, the changes of tenants are fewer. But the tenants have not shown that new tenants came in as alienees of former tenants and not new admission by the landlord. We may observe that the case in *Bhadrayya* v. *Bapayya* (6) cannot be regarded as good law after *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (2). It is also true that there is only one enhancement. In our opinion these facts are enough to negative occupancy rights but if we can conceive that other Judges may come to a different opinion if sitting as Judges of fact, still there is no justification for interference with the findings of the Lower Appellate Court in second appeal. We are also of opinion the Jagurupad second appeals also fail and are dismissed with costs.

Annamdevula Thata v. Khwaja Ahamadulla Khan Saheb Bahadur.

T. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Ernest William Adams ... *Appellant**

v.

Mrs. H. S. F. Gray and another ... *Respondents.*

Ernest William Adams v. Mrs. H. S. F. Gray.

Will—Construction—Life-estate—Gift to children of life-tenant who shall attain the age of twenty-one—Provision for advancement and maintenance—Gift over on death of life-tenant without children of the age of twenty-one years—Vested estate—Defeasance clause—Operation of—Use of technical expressions in wills—Interpretation.

A testator died leaving a son and two daughters. By his will he left a sum of Rs. 30,000 to his younger daughter Alice Gray and her children in these terms : "And as to the sum of rupees thirty thousand upon trust to pay the interest and income arising from the same unto my daughter the said Hester Alice Gray for her life, for her sole and separate use........and after the death of the said Hester Alice Gray in trust for her lawful child or children

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*O S Appeal No. 97 of 1923. 15th December, 1924.

2. (1923) I L R 47 M 337 : 46 M L J 546 (P.C.) 6. (1911) 21 M L J 803.

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who, being sons or a son, shall attain the age of twenty-one, or being daughters or a daughter, shall attain that age or marry, and if more than one, in equal shares........Provided also that the said trustees may, after the death of the said Hester Alice Gray, or previously thereto, raise any part or parts not exceeding one-half part of the then expectant, presumptive, or vested share or fortune of any child under the trusts hereinbefore declared and apply the same for his or her advancement or benefit. The said trustee shall, after the death of the mother of any child entitled in expectancy under the trusts hereinbefore declared, apply the whole or such part as he shall think fit, of the annual income or fortune to which any child shall, for the time being, be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education of such child and shall during such suspense of absolute vesting accumulate the residue thereof for the benefit of the person or persons who, under the trusts herein contained, shall become entitled to the principal fund from which the same respectively shall have proceeded with power for the said trustee to resort to the accumulation of any preceding year or years and apply the same for the maintenance or education of the child for the time being presumptively entitled to the same respectively. And if the said Hester Alice Gray shall die leaving no child living at her death who, being a son, shall attain the age of twenty-one years or being a daughter, shall attain that age or marry, then, after the death of the said Hester Alice Gray and such default or failure of children, I bequeath the said moneys and the investments representing the same or so much thereof as shall not have become vested or has been applied under the trusts aforesaid........unto my son, Thomas Campbell Gray, who I hereby appoint residuary legatee." Hester Alice Gray died on 28th November, 1922, leaving no issue her surviving. Her only son Adams had died in June, 1918, after having attained the age of twenty-one. The fund in question was claimed by the father and representative of Adams on the one hand and the widow and representative of Thomas Campbell Gray on the other. *Held*, on a construction of the will, that the son of Hester Alice Gray took a vested interest in the fund on his completing his twenty-first year even before the death of his mother; that his survival of his mother was not a condition precedent to his taking an interest under the will; and that the gift over clause could not operate as a defeasance, at any rate, with regard to any interest already vested. Consequently the father and representative of Adams was held entitled to the fund. *Maitland* v. *Chalie*, 6 M R 243; *Fox* v. *Fox*, 19 Eq Cases 286; *In re, Cabbold*, (1903) 2 Ch 299; *In re, Hamlet*, 39 Ch D 426 followed. *Young* v. *Turner*, 30 L J (Q B) 268 distinguished.

The principle to be borne in mind in regard to the construction of wills is that, as far as possible, the real intentions of the testator as expressed in his will should be ascertained and given effect to. The so-called rules of construction found in decided cases are merely aids to enable the Courts to discover the real intentions of the testator. Where, however, technical expressions are found in an English will drawn up for an Englishman by his solicitor, the Court would assume that the said expressions have been employed with the meaning and significance generally believed to attach to them in the particular branch of the law.

Distinction between vested and contingent remainders pointed out.

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On appeal from the judgment of the Hon'ble Mr. Justice Devadoss, dated the 19th September, 1923, passed in the exercise of the Original Testamentary Jurisdiction of the High Court in the matter of the last Will and Testament of Charles Gray, deceased, and in the matter of the Administrator-General's Act III of 1913.

Nugent Grant and *Vere Mockett* instructed by *Messrs. Moresby* and *Taylor* for appellant.

R. N. Aingar and *O. T. G. Nambiar* instructed by *Messrs. King and Partridge* and the *Administrator-General* for respondents.

The Judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The task before us in this appeal is, as Lord Loughborough, the Lord Chancellor, observed in a case, to find out the meaning of words which the party using them did not understand. It relates to the construction of the will of one Charles Gray. The matter came up before Mr. Justice Devadoss, on the Original Side on a summons taken out by the Administrator-General of Madras for the purpose of construing the will and determining the rights thereunder of two claimants on behalf of each of whom it was urged that in the events that have happened he or she has become entitled to the part of the estate in question. There can be no doubt that the first principle to be borne in mind in regard to construction of wills is that, as far as possible, the real intentions of the testator as expressed in the will should be gathered and ascertained and given effect to. The so-called rules of construction to be found in such abundance, more especially in English decisions, are merely aids to enable us to discern or discover the real intentions of the testator and not artificial rules which should be allowed to over-ride in any given case the expressed intentions of the testator.

Lord Halsbury, the Lord Chancellor, referred in the case of *Leader* v. *Duffey* (1) to the modern view which he thought was in accord with reason and commonsense that whatever the instrument it must receive a construction according to the plain meaning of the words and sentences therein contained. Referring to this observation of the learned Lord Chancellor, Lord Justice Cotton in the case of *In re Hamlet* (2) observes that rules of construction are only intended to aid

1. (1888) L R 13 A C 294. 2. (1888) L R 39 Ch D 426.

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us where there is ambiguity, and not to enable us to get rid of the express words of the testator if expressed in clear language. This would undoubtedly be so in the case of an instrument expressed in plain language by a layman. When however we come to an instrument, which, having regard to the form and the technical language employed may aptly be described as being in a language which the party using did not himself understand we come to a state of things in which we cannot altogether ignore even the technical rules of construction. The will before us was not only by an Englishman and in the English language but was apparently drawn up by one of the leading Solicitors in Madras at the time, and bristles with technical expressions and clauses which are to be found in all common forms and in most of the cases. When such highly technical expressions are used in an instrument it is not possible entirely to ignore the construction placed on such technical expressions by eminent and learned Judges in the Courts of Chancery in England ; because it must be assumed that the technical expressions employed have been employed with the meaning and significance generally believed to attach to them in the particular branch of the law.

We may observe in this connection that in view of the very difficult questions involved we enquired of both the parties whether they did not consider it would be the better course to have the matters finally decided in an action instead of on an application ; but both of them have agreed that any decision come to on this application should have the same effect as a decision in a suit between them so as to bind them finally.

The facts are these :—The testator left a son and two daughters and the contest here relates to the sum of Rs. 30,000 left to the younger daughter Hester Alice Gray and her branch.

The clauses in the will relating to the disposition of this sum of Rs. 30,000 are as follows :—

"And as to the sum of rupees thirty thousand a further part of the said investments upon trust to pay the dividends and interest and income arising from the same unto my daughter, the said Hester Alice Gray, for her life for her sole and separate use free from the debts and control of any husband that she may marry and her receipt alone to be a sufficient discharge for the same and after the death of the said Hester Alice Gray in trust for the lawful children or any of the lawful child of the said Hester Alice Gray, who, being sons or a son, shall attain the age of twenty-one years or being daughters or

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daughter, shall attain that age or marry, and if more than one, in equal shares. Provided also that the said trustees or trustee may, after the death of either of them, the said Mary Harriet Annie Wilson or the said Hester Alice Gray, or previously thereto if she shall so direct in writing, raise any part or parts not exceeding one-half part of the then expectant, presumptive or vested share or fortune of any child under the trusts hereinbefore declared, and apply the same for his or her advancement or benefit and I declare that the said trustees or trustee shall, after the death of the mother of any child entitled in expectancy under the trusts hereinbefore declared, apply the whole or such part as they or he shall think fit of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education of such child either directly or to his or her guardians without seeing to the application thereof or requiring any account of the same and shall during such suspense of absolute vesting accumulate the residue (if any) thereof in the way of compound interest by investing the same and the resulting income thereof in or upon any such stocks, funds or securities as are hereinbefore mentioned for the benefit of the person or persons who under the trusts herein contained shall become entitled to the principal fund from which the same respectively shall have proceeded with power for the said trustees or trustee to resort to the accumulation of any preceding year or years and apply the same for or towards the maintenance or education of the child for the time being presumptively entitled to the same respectively."

Later on in the will there is the following clause :—

"And if either of them the said Mary Harriet Annie Wilson and the said Hester Alice Gray shall die leaving no child living at her death who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry then after the death of either of them the said Mary Harriet Annie Wilson and the said Hester Alice Gray and such default or failure of children I bequeath the said moneys and the investments representing the same or so much thereof as shall not have become vested or has been applied under the trusts aforesaid......unto my son Charles Thomas Campbell Gray, who I hereby appoint as my residuary legatee."

The facts material for the purpose of understanding the claims and contentions before us have been admitted. Hester Alice Gray died on the 28th of November, 1922. When she died she had no issue living. Her only son E. G. Adams had died in June, 1918, after having attained twenty-one years of age. The claimants before us are Mrs. Gray, the widow and representative of Charles Thomas Campbell Gray, son of the testator, and Rev. Mr. Adams, the father and representative of E. G. Adams. The case for Mrs. Gray has been put in two ways and it is contended that in either of those two ways she would be the person entitled to the moneys now representing the bequest aforesaid of Rs. 30,000. It is firstly contended that the interest created in favour of the children

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of Hester Alice Gray is a contingent interest and on a proper construction of the various clauses in the will no children of Hester Alice Gray could get a vested interest in it unless both of the two contingencies are satisfied, namely : completion of the twenty-first year and surviving Hester Alice Gray, the mother. On this it is argued that as E. G. Adams did not survive his mother but died before her, he took no vested interest although he completed his twenty-first year. In default therefore of any children of Hester Alice Gray taking, it is said that Mrs. Gray, who now represents the son of the testator, has become entitled. Secondly, in the alternative, it is contended that assuming that E. G. Adams took a vested interest in the fund, the later clause in the will above recited containing the gift over is in the nature of a defeasance clause and on a proper construction thereof when he did not survive his mother, his vested interest, if any, became divested and devolved by way of gift over upon the representative of the testator's son.

The contention on behalf of Rev. Mr. Adams was that on a proper construction of the will the son of Hester Alice Gray took a vested interest on his completing his twenty-first year even before the death of his mother, and that the gift over clause could not, on a proper construction thereof, operate by way of defeasance, at any rate with regard to any interest already vested.

What we have therefore to decide is which of these two sets of contentions should be upheld as being the right one. The learned Judge on the Original Side came to the conclusion that as E. G. Adams did not survive his mother he took no vested interest in the estate and he accordingly decided that Mrs. Gray was entitled to the fund. We have heard full arguments from the learned counsel on both sides and after a careful consideration of all the contentions we have come to the conclusion that the decision of the learned Judge was wrong.

The learned Judge appears to have misdirected himself by a consideration of the terms of the gift over clause in arriving at a conclusion with regard to the question of vesting. Holding that there was no vesting he concluded that the gift over clause should have operation.

The questions for solution, therefore, are : firstly, whether on a true construction of the several clauses in the will,

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E. G. Adams obtained a vested interest in the fund in question; and secondly, if he did, whether such interest became divested by the gift over taking effect on his dying before his mother and not surviving her.

There is no dispute about the life-interest bequeathed to Hester Alice Gray. The remainder is given to the lawful child of the said Hester Alice Gray, who, being a son, shall attain the age of 21 years. This is the clause, therefore, which has to be looked at for the purpose of determining the question regarding the nature of the estate given or bequeathed. And unless a contrary intention to be gathered from any other clause in the will should be found to affect the nature of the estate given under this clause, it follows that the question whether or not E. G. Adams obtained a vested interest in the fund should be determined solely by reference to this clause. We shall advert later to the other clauses in the will bearing in any manner on the present question. It is perfectly clear from all the text-books and the decided cases that if a bequest is to a person for life and after his death to his children, the bequest becomes vested in each child as and when he or she is born and the vesting is not postponed till the death of the life-tenant. The expression "after his death" is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the right to such possession vests. See *Hallifax* v. *Wilson* (3). The principle underlying this rule is that no contingency is imported by the mere fact that the legacy is given after a life-estate in the property bequeathed. As nothing is more certain than that every person who lives must die, the death of a life-tenant is an event not contingent but certain ; and therefore a gift on the death of a life-tenant is a bequest to take effect not on a contingency but on an event certain to happen ; and therefore the donees of the gift are held to obtain a vested interest in it as and when they come into being. But if the bequest had been not merely after the death of the life-tenant but to such of her children as may survive her or should be alive at her death, then clearly the condition of surviving or being alive at her death would be a condition precedent to the vesting itself, and in such a case, therefore, no child that does not so survive will acquire a vested interest in the bequest. The obvious principle underlying this rule of construction is that

3. (1809) 16 Vesy 168.

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though the death of the life-tenant is certain, still it is by no means certain that the donee will survive the life-tenant. And if from the words of the gift the intention of the testator is clear that the persons taking should be only such persons as survive or are alive on the death of the life-tenant then it follows necessarily that it is a contingent gift upon the donee surviving the life-tenant. Till such contingency is fulfilled, there can be no vesting. But there are no such words in the clause creating the bequest under reference. The words merely are, "after the death of Hester Alice Gray" and there are no such words as "to such of the children of Hester Alice Gray as may survive her or should be alive at her death." It therefore follows that if the words of the gift had been merely "to Hester Alice Gray and after her death to her children or child," E. G. Adams would have taken a vested interest in the fund on his birth. But then there are further words in the clause, *viz.*, "who being a son shall attain the age of twenty-one years." There can be no doubt whatever that the attaining of twenty-one years is clearly a condition and the intention of the testator was (apart from other clauses in the will), that no son of Hester Alice Gray who does not attain twenty-one years should take. The requirement, threfore, that the son of Hester Alice Gray to take should be one who had attained twenty-one years is a contingency and would make the bequest a contingent bequest. The position, then, is this : that a bequest to E. G. Adams, which would otherwise have vested on his birth, is made contingent on his attaining twenty-one years. It logically follows from this position that the contingency being fulfilled on his attaining twenty-one years the bequest becomes vested in him immediately on his attaining twenty-one years without any reference whatever to the death of his mother, Hester Alice Gray, whether such death takes place either after or before he should attain that age.

This was what was decided in *Maitland* v. *Chalie* (4) The principle or correctness of this case has never been doubted. Thus, it is clear that under the terms of the clause in the will creating the bequest and on its proper construction, E. G. Adams obtained a vested interest in the fund on his attaining twenty-one years.

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4. (1873) 6 Maddock Reports 243.

Having arrived at this result without any consideration whatever of the other clauses in the will, we may now consider the bearing of such other clauses on this conclusion. The provision in the will with regard to the application up to one-half out of the corpus of the fund for the advancement of any child of Hester Alice Gray with her consent in writing during her lifetime and after her death at the discretion of the trustees, is also a clear indication of the intention of the testator as deduced above. For, it clearly points to a considerable benefit in the legacy accruing to such children even before the arrival of the period of distribution. Again it is significant that the testator in that part of the clause should have used the words " the then expectant, presumptive or vested share or fortune of that child "—words which are obviously calculated to suggest the possibility contemplated by the testator of a vesting in a child even before the death of the mother. The provision in the will in the succeeding clause relating to the gift of the interest or income relating to the share or fortune of each child is also a clear indication regarding the intention of the testator as to the vesting. This rule was laid down by Jessel, M. R. in *Fox* v. *Fox* (5).

In re, Turney : *Turney* v. *Turney* (6) Lord Justice Lindley referred to this case of *Fox* v. *Fox* (5) and followed it as good law, and *In re, Usher* : *Foster* v. *Usher* (7) Astbury, J. also followed it.

It is also significant that in this part of the will the testator, while referring to a minor child of Hester Alice Gray, speaks of it as entitled in expectancy but at the same time refers to the share or fortune of each child as separate and the income accruing from it also as distinct. The provision for the accumulation of interest and compound interest relating to the share of each child separately for its own benefit is absolutely inconsistent with the idea of the share not vesting in the child even before the child should attain twenty-one years of age. It is further very significant that the testator should refer to the period of such accumulation as a period during which there is suspense of absolute vesting. From all these indications the inference is strengthened, which has been arrived at already independently of them, that the estate taken by E. G. Adams was a vested interest on his

5. (1875) 19 Eq Cases 286. 6. (1899) L R 2 Ch D 739.
7. (1922) L R 2 Ch D 321.

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completing twenty-one years. There is no question in this case of the quantity of the interest so vested because E. G. Adams was admittedly the only son of Hester Alice Gray and what vested in him was the whole of the fund in question.

It only remains then to consider the question whether on this basis of the fund having vested in E. G. Adams on his attaining twenty-one years there resulted any divesting under the clause containing the gift over.

The clause containing the gift over which has been contended to operate by way of defeasance or divesting any estate vested in E. G. Adams has already been set out. It is significant to begin with that in this clause there are no words of defeasance or divesting. But at the same time the words of the gift over are perfectly clear. According to the clause, in the event of there being no child living at the death of Hester Alice Gray, the gift over is to take effect. If the words had been merely that on the death of Hester Alice Gray " without leaving children " there should be a gift over, those words " without leaving children " would be construed only as meaning " without leaving or having had children who have attained vested interest, " and would not be held to be apt to disturb any vested interest as was held in the case of *In re Cabbold : Cabbold* v. *Lawton* (8). But the words are not merely " without leaving children " but " leaving no child living at her death, " and there being no possible ambiguity about such words, it has been held that such words should be construed literally and be given effect to. The leading case on this point is the case of *In re, Hamlet* (2). The learned Judge in the First Court following this case held that E. G. Adams did not obtain a vested interest in the fund in question. It is impossible to understand how the learned Judge treated this case as an authority for coming to the conclusion that he did that there was no vesting of the fund in E. G. Adams. The case is undoubtedly an authority with regard to the gift over clause. But as regards the vesting itself, Lord Justice Cotton in that case held that two of the children who had attained twenty-one years before their mother's death had acquired a vested interest. At page 432 he says this : " The daughter was under age and unmarried at the testator's death. She afterwards married and had

2. (1888) L R 39 Ch D 426. 8. (1903) 2 Ch 299.

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several children *two of whom attained twenty-one and so acquired a vested interest ;* but all the children died before their mother." Again at page 435 the same learned Judge observes as follows : "The argument which appeared to me to deserve most consideration is that these words were to be considered as a mere continuation of the limitation which was to take effect if no vested interest was obtained by the children under the preceding words." Both the counsel for the appellant relied on the words of the introduction, "And in case my said daughter......." They said that those were not words which would be naturally used if the testator was defeating a previously vested interest. But I am struck with this, that in the latter part of the will, where the testator disposes of the unsold part of his real estate, he first gives it to the children by words which clearly would give them vested interest on their births, and then introduces a gift over by the same words as those we are now considering. I do not much rely on that clause as showing us what his intention was but only as showing us that he used the words "And in case" to introduce a limitation displacing a previous vested gift, a limitation which clearly was intended to *displace a previous vested interest,* and which could not be contended to be merely carrying out a series of limitations to take effect on failure of the previous objects of the gift. And further on at page 438 he states "but there is no inconsistency in a gift over defeating a previous vested interest" and concludes with the following sentence : "In my opinion, on the true construction of this instrument, the words express the event on which the gift over was to take effect too clearly notwithstanding any view we may have that it would have been much better if the testator had made a different disposition."

In re, Hamlet (2), therefore, far from being an authority for the fund not vesting, is strong authority in favour of its vesting. As regards the divesting, however, it is no doubt a clear decision in favour of the contention on behalf of the respondent. We should have felt ourselves bound to follow that decision and hold that the estate had vested in E. G. Adams became divested by reason of his not surviving his mother but for the presence in the clause of the following words, namely : "Or so much thereof as shall not have become vested." The law, it has been said, does not favour divest-

2. (1888) L R 39 Ch D 426.

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ing, and in any case, the conditions for divesting and the intention to divest should be clearly made out. As it has been already pointed out there are no words in the clause indicating any defeasance or divesting. But as observed by Lord Justice Cotton in the case of *In re, Hamlet* (2) if the gift over is absolutely clear it may necessarily involve a defeasance or divesting. The *raison d'etre* of such decisions as *In re, Cabbold* (8) is that such words as "leaving no children" should be construed merely as meaning "leaving or having had no children who have not obtained vested interest" and should be construed so as not to disturb or divest any vested interest. In other words, unless from the gift over clause the intention is perfectly unambiguous, clear and definite that any vested interest whatsoever should cease and become divested, the gift over will not be held to have that effect. In the present case, however, the intention of the testator is perfectly clear from the words he had used that the gift over should not operate in respect of any interest that has vested. It therefore follows from this that the intention of the testator in the gift over clause was not to divest any vested interest.

The learned counsel for the respondents contended in effect that the gift over clause should be read as if the words "or so much thereof as shall not have become vested" were not there. We could not possibly accede to any such contention. He also relied strongly for his argument on the case of *Young* v. *Turner* (9). So far as the question of the gift over and divesting is concerned that case is undoubtedly a case quite similar to the case *In re, Hamlet* (2).

This case of *Young* v. *Turner* (9) undoubtedly bears many points of resemblance to the case before us, and it therefore follows that if there were no points of distinction between that case and this, we might have felt bound to follow the decision in that case of the very learned Judges who constituted the Court.

The questions considered and decided in that case were exactly the same that have arisen for decision in this case, namely, whether in the first place any estate did vest in a child that attained twenty-one years but died before the termination of the life-estate ; and in the second place, whether even if the estate did vest, there was no divestment by the

2. (1888) L R 39 Ch D 426.

8. (1903) 2 Ch 299.

9. (1861) 30 L J (Q B) 268.

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gift over if on the death of the life-tenant there should be no issue of her body alive. The main decision in the case was that even if there had been vesting there was a divesting as the result of the clause containing the gift over. This is what Justice Blackburn, who delivered the judgment of the Court in that case has said : "And if an estate did vest in the issue of the body of the niece attaining twenty-one it would be divested upon the death of such issue in her life-time under the terms of the will." In this view it was unnecessary for the learned Judges to consider the question whether having regard to the terms of the particular will the estate had or had not vested in such a child. We must take it that it is for that reason that the case is generally cited only as an authority for the position that the general rule that a gift over which is directed to take effect on the death of some person without leaving issue should not be construed in such a manner as to divest any estate already vested is not applicable to cases where the intention is perfectly clear from the language of the instrument that what was clearly intended was that the gift over should take effect if on the death of the life-tenant there should be no issue living of the deceased life-tenant. The rule laid down by this case is that if from the gift over clause the intention of the testator is to be clearly gathered that any estate that may have vested previously should be divested on the contingency referred to in the gift over clause then such intention should be given effect to and not otherwise.

It is the same rule that following this case of *Young* v. *Turner* (9) that was again laid down in *In re, Hamlet* (2) and it is accepting the rules so laid down we came to the conclusion that, having regard to the particular words of the gift over clause in the will before us the testator's intention clearly was that no estate which had become vested should be divested by the gift over clause. So far therefore as the construction of the gift over clause is concerned, the conclusion we have arrived at is clearly in consonance with the rule laid down in the case of *Young* v. *Turner* (9).

But that case was also sometimes referred to as an authority with regard to the question of vesting though the decision in the case as already observed turned only on the construction

2. (1888) L R 39 Ch D 426. 9. (1861)) 30 L J (Q B) 268.

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of the gift over clause. It is clear, however, that in that case, Justice Blackburn delivering the judgment of the Court found that the object of the testator was to provide only for such of the issue of his niece as may be living at the time of her death. The words in the will before the Court were, "And if my said niece shall depart this life leaving only one child of her body lawfully begotten, then I give and devise the property unto such only child and his or her heirs as soon as he or she attains the age of twenty-one years aforesaid." From the terms apparently of this clause of the will the Court came to the conclusion in that particular case that the intention of the testator was that only such children should take as survived the mother. So far, therefore, as the question of vesting is concerned, *Young* v. *Turner* (9) should be deemed to belong to that class of cases where, having regard to the language used in the particular instrument, it was held that the intention of the testator was that surviving the mother or being alive at her decease was one of the conditions of the vesting of the estate.

We have already referred to that class of cases and held that on the language of the will before us it was clear that E. G. Adams obtained a vested interest in the fund. If, therefore, the intention of the testator in the gift over clause was that the clause should affect any interest already vested, it necessarily follows that any estate vested in E. G. Adams could not be held to be divested or defeated by anything contained in the gift over clause.

The learned counsel for the respondents contended that in the view taken by us of the gift over clause there could be no case of a vesting of a part of the estate as would seem to have been contemplated in the words in the gift over clause already referred to, namely, "or so much thereof as shall not have become vested." But what we have been concerned with was the intention of the testator; and we cannot adopt a construction which would have the effect of defeating the clear intention of the testator merely because the words used by him might refer to a contingency which might never arise, more especially having regard to the fact that no one can be certain in the case of such complicated provisions what contingencies may or may not arise.

9. (1861) 30 L J (Q B) 268.

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In our judgment, therefore, the learned Judge below was wrong, and the appeal succeeds and should be allowed. It will be declared that the estate having become vested in E. G. Adams there was no divesting of that estate and that therefore on his death it passed to his representative, his father. Having regard, however, to the extremely difficult nature of the questions involved, we think this a proper case in which we should direct that the taxed costs as between attorney and client of both parties in this appeal also should come out of the estate. We certify for the two counsel on both sides.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Lodd Govindoss Krishnadas Varu ... *Plaintiff**

v.

P. M. A. R. M. Muthiah Chetty ... *Defendant.*

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Evidence Act, S. 92—Registered sale deed—Transfer of a mortgage decree—Recital as to amount of price—Oral agreement to take a smaller amount—Evidence inadmissible—Transfer of Property Act, S. 55—Right of vendor to interest on unpaid purchase money—Practice—Original Side of the High Court—Institution of suit by agent without obtaining leave—Limitation.

Where the consideration for an assignment of a mortgage decree is stated in the registered deed of assignment to be Rs. 2,89,000, the amount of the price is an essential term of the contract and oral evidence is inadmissible to prove that the price agreed to be paid was in fact something less than the amount recited in the deed.

Adityam Aiyar v. *Ramakrishna Aiyar,* I L R 38 M 514 ; *Lalasingh* v. *Basdeo,* 71 I C 768 ; *Annada Charan Sil* v. *Haragobinda Sil,* 37 C L J 552; *Cowasji Ruttonjee Limboowalla* v. *Burjorji Rustomji Limboowalla,* I L R 12 B 335 followed ; *Chunni Bibi* v. *Basanti Bibi,* I L R 36 A 537 ; and *Hanif-un-nissa* v. *Faiz-un-nissa,* I L R 33 A 340 distinguished.

Under S. 55 (4) (*b*) of the Transfer of Property Act, interest is payable to the vendor on the unpaid purchase money only if the ownership of the property has passed absolutely to the purchaser and the property is in his enjoyment.

Where the plaint was signed by a person purporting to act as agent of the plaintiff and presented on the Original Side of the High Court on the last day of limitation without obtaining the necessary leave from the Deputy Registrar to sign and verify the plaint as agent, and leave was subsequently granted by the Judge, *held,* that the omission to obtain leave initially was a mere irregularity which was cured by the subsequent grant of leave by the Judge and that the suit was in time.

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*C S No. 722 of 1920. 3rd March, 1925.

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Suit to recover Rs. 29,000 (together with interest), being unpaid balance of the advance of Rs. 89,000 recited as having been paid in the Deed of Indenture, dated 1st October, 1917, whereby the plaintiff assigned to the defendant in consideration of Rs. 2,89,000, one-eighth share of the mortgage decree obtained in O. S. No. 12 of 1901 on the file of the District Court of North Arcot against the Narayanavaram Taluk of the Karvetnagar Estate.

The facts of the case sufficiently appear from the judgment.

V. Radhakrishnaiah for plaintiff :—The defendant cannot be allowed to prove that the consideration for the assignment was only Rs. 2,60,000 and not Rs. 2,89,000 ; S. 92, Indian Evidence Act ; price or consideration is a term of the contract and cannot be varied : 38 Mad. 514; 71 I. C. 768 (All.) ; 37 C. L. J. 552 ; performance of a contract is different from the making of the contract.

Plaintiff is also entitled to interest on the sum of Rs. 29,000 which is admitted not to have been paid ; the Interest Act applied as the amount was " payable by virtue of some written instrument " ; under S. 55, cl. (4), sub-cl. (*b*) of the Transfer of Property Act, seller is entitled to a charge not merely for the balance of the purchase money but also for interest on the amount.

N. Chandrasekhara Aiyar for defendant.—Past consideration is good consideration under Indian Law ; previous payment of Rs. 89,000 is stated in the deed to be the consideration and so plaintiff himself is, on his own showing, debarred from contradicting it under S. 92 of the Indian Evidence Act ; if plaintiff could show only Rs. 60,000 was paid, defendant could prove that only that amount was to be paid ; a party cannot be allowed to disaffirm a transaction for his own relief and affirm it for his adversary's disadvantage : 12 M. I. A. 157 (185) ; 38 Mad. 514 and other cases following it were wrongly decided ; 36 All. 537 enunciates correct law ; consideration could always be proved to have been different : 11 Cal. 486 ; 3 Bom. 159 ; 5 Mad. 6 ; 5 C. W. N. 158 ; 15 C. W. N. 408 and 4 A. L. J. 441 ; the mode in which consideration was to be paid could be proved : 18 All. 168 ; 22 All. 370 (P. C.) ; evidence could be let in to prove that what purported to be a deed of sale was in reality a deed of gift : 33 All. 340 (P. C.) reversing 27 All. 612.

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Payment of a smaller sum in discharge of a larger sum due would be good accord and satisfaction under Indian Law ; S. 63 of the Indian Contract Act.

Plaintiff not entitled to interest ; deed provides that till payment by defendants they cannot have rents and profits ; Interest Act does not apply because (*a*) there is no covenant to pay in the deed, and (*b*) amount is not payable " at a *certain time*" ; S. 55, cl. 4, sub-cl. (*b*) creates no obligation to pay interest ; it only declares a charge for interest, if any : 21 M. L. J. 236.

Lastly, plaintiff could not get a decree for Rs. 29,000 ; in the event of breach, parties have contemplated a particular remedy, namely, a proportionate reduction in the amount of rents and profits payable to defendants ; plaintiff could not therefore have the remedy by suit : maxim *expressio unius,* etc., applies : 1 Ellis & Blackburn 310.

The Court delivered the following

JUDGMENT :—Two main questions, one of law and one of fact, are raised in the issues framed in this suit. The question of fact can be determined only on oral evidence being admitted with regard to certain allegations made by the defendant and the question of law relates to the admissibility of that oral evidence. The question of law raised is therefore really in the nature of a preliminary issue. At one stage I thought whether it would not really be wiser to allow also oral evidence to be adduced and to record a finding thereon for the contingency of a higher tribunal taking a different view, but Mr. Radhakrishniah, the learned vakil for the plaintiff, intimated to me that his client was willing to take the risk and cost of the Court of Appeal remanding the case in the event of my decision on the question of law being in his favour and the same being set aside in appeal.

The facts so far as they are necessary for the determination of the main question of law may be set forth very briefly. The suit was originally instituted only against P. M. A. R. M. Muthiah Chetty and on his death his sons have been brought on the record as his legal representatives. The plaintiff who succeeded his father as the holder of a mortgage decree for a large amount in the District Court of Chittore assigned pursuant to an agreement with respect thereto an eighth share under the decree to the 1st defendant for an alleged consideration of Rs. 2,89,000. The deed of assignment, which has

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been marked as Ex. A in this case, bore the date the 1st day of October, 1917, and the material recitals in the deed were, that the plaintiff had agreed to assign to the 1st defendant the eighth share of the decree for a consideration of Rs. 2,89,000 to be paid by the 1st defendant to the plaintiff, whereof Rs. 89,000 was paid in advance on the day of the execution of the deed of assignment, and that, as regards the balance of consideration, namely, Rs. 2,00,000, other arrangements set out therein had been made for the payment thereof by the 1st defendant to the plaintiff and the operative portion of the deed proceeds to witness that the eighth share in the decree was thereby assigned by the plaintiff to the 1st defendant in pursuance of the said agreement and in consideration of the said sum of Rs. 2,89,000 paid and payable as aforesaid.

The plaintiff's case is, that though in the said deed it was recited that the sum of Rs. 89,000 payable under the agreement on or before the execution of the assignment had been paid up, only a sum of Rs. 60,000 had been so paid and that the balance of Rs. 29,000 had not been paid and that therefore, he was entitled to a decree for that amount with interest thereon at 12 per cent. per annum.

The defendant's case in substance is, that the consideration really agreed to between the parties for the assignment was only Rs. 2,60,000, that the consideration, however, was agreed to be recited in the deed of assignment at Rs. 2,89,000, that it was no doubt true that only Rs. 60,000 was paid on or before the execution of the assignment, that the balance of Rs. 29,000 was not paid as it was never intended to be paid, and that it was for that reason and for the purpose of carrying out the real intention and agreement between the parties that though only Rs. 60,000 was paid it was recited that Rs. 89,000 had been paid up by the 1st defendant and received by the plaintiff. The defendants do not rely upon any other writing for the purpose of proving their contention and it is conceded that the arrangement set out by them was only parol. It was apparently thereupon that the issue has been raised whether it is open to the defendants to plead that the consideration for the assignment was only Rs. 2,60,000 and not Rs. 2,89,000 as recited in the deed. The question is not free from difficulty and has become particularly complicated by reason of the fact that in the deed of assignment the balance which, according to the plaintiff, was still payable

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and had not been paid is recited to have been paid up. The learned vakil for the plaintiff, Mr. Radhakrishnayya, put his contention thus : The recital in the deed of assignment of the payment of Rs. 89,000 by the 1st defendant to the plaintiff is a recital of fact and there can be no question that the law allows the parties to a deed to show by oral evidence that a recital of fact in a deed is not true. In this case there is no question of the plaintiff having to show by oral evidence that the recital is not true because the defendants in their written statement admitted that the recital is not true. On the admission of the defendants, therefore, the plaintiff's case that only Rs. 60,000 out of Rs. 89,000 had been paid has been established. As regards the balance of Rs. 29,000 the defendants attempt to prove that the consideration agreed to was not Rs. 2,89,000, but only Rs. 2,60,000, is an attempt to vary the terms of a contract ; that in this case the terms of the contract have been reduced to writing in the deed of assignment and that therefore the defendants are not at liberty to contradict the writing by parol evidence. The clause in the deed of assignment referring to the terms of the contract is as follows :—

"Whereas the said Lodd Govindoss has agreed to assign to the shareholder Mr. P M A R M Muthiah Chettiar 1|8th, (one-eighth) share or 12 1|2 per cent. of the said decree amount together with the securities therefor and the outstanding arrears of rents and profits as standing on this day that may be realised according to the accounts of the Taluk Office for a consideration of Rs. 2,89,000 (Rupees two lakhs and eighty-nine thousand) to be paid by the shareholder Mr. P M A R M Muthiah Chettiar to the said Mr. Lodd Govindoss Krishnadoss."

This same amount of consideration, namely, Rs. 2,89,000 is mentioned elsewhere in more than one place in the same document as the total amount of consideration or price payable by the assignee and the rights and liabilities are according to the scheme set out in the document created with special reference to that amount as the amount of the consideration or price and what is more than all it is stipulated and provided particularly that if and so long as the assignee should not have paid to the assignor the whole amount of the said consideration of Rs. 2,89,000 the profits or properties or sale proceeds he shall receive shall be that fraction of the one-eighth share which the amount he had paid till then is of the total price of consideration of Rs. 2,89,000.

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The learned vakil for the plaintiff submitted that the amount of consideration in a deed of assignment is perhaps the most important of the terms of a contract of assignment and in the clause above set out it is clearly stated in writing that the consideration agreed to be paid and payable by the assignee to the assignor is Rs. 2,89,000, and that, therefore, under S. 92 of the Evidence Act, the defendant is not entitled to seek to adduce parol evidence to contradict this term of the contract reduced to writing between the parties. In fact his contention was that it was unnecessary for him really to go beyond the terms of the section. But he has also referred to numerous cases for the purpose of supporting his contention. The decision in *Adityam Aiyar* v. *Ramakrishna Aiyar* (1) by a Bench of this Court is a case directly in point. That case has not been sought to be distinguished from the present case and if I am bound by the decision in that case as undoubtedly I am, it is unnecessary for me to go further and discuss the various contentions raised before me by the learned vakil for the defendants, Mr. Chandrasekhara Aiyar, for the purpose of showing that that decision is wrong. But as the question, however, has been very ably argued and at great length on both sides, I might as well set out in brief my own views with regard to them.

In *Lalasingh* v. *Basdeo* (2) Mr. Justice Walsh of the Allahabad High Court followed the decision of this Court in *Adityam Aiyar* v. *Ramakrishna Aiyar* (1). Similarly in the case of *Annada Charan Sil* v. *Haragobinda Sil* (3), Justice Sir Ashutosh Mukherji and Justice Chotzner held, following the Madras decision, that while want or failure or difference in kind of consideration may be proved evidence to vary the amount of consideration in a deed is inadmissible.

The case of *Cowasji Ruttonji Limboowalla* v. *Burjorji Rustomji Limboowalla* (4) was also referred to on behalf of the plaintiff. The plaintiff's contention has thus been sought to be reinforced by the decision of all the High Courts in India.

In this state of the authorities Mr. Chandrasekhara Aiyar, vakil for the defendants, was bound to argue that the decision in *Adityam Aiyar* v. *Ramakrishna Aiyar* (1) by this Court was wrong. He put forward his contentions in four ways. The

1. (1913) I L R 38 M 514 : 25 M L J 602.
2. (1923) 71 I C 768.
3. (1922) 37 C L J 552.
4. (1888) I L R 12 B 335.

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first was that if one party to a deed came forward with the case that a particular recital in a deed regarding the considera-tion for the transaction was not true and he should be allowed to prove it, then, the other party to the deed should be allowed and becomes entitled to prove the real agreement between the parties in spite of the provisions of S. 92 of the Evidence Act. The second contention was that the terms of the contract of assignment on a proper construction of the deed of assignment were that the assignment should be made on the basis of Rs. 89,000 already paid and received by the assignor and in considera-tion of the arrangement made for the payment of the balance and that therefore there was really no question of varying the terms of the contract. The third contention was that on a proper construction of the deed of assignment the sale was partly for a past consideration, namely, the admitted pay-ment of Rs. 89,000, and that there could be no question in law of the adequacy or otherwise of the past consideration. The fourth contention was that under the Indian Law a cre-ditor was entitled to give up validly and so as to bind himself any portion of the amount due to him and that, therefore, if out of Rs. 89,000 due and payable by the assignee, the assignor gave up voluntarily Rs. 29,000 and agreed to accept Rs. 60,000 in lieu of Rs. 89,000 it was tantamount to receipt in full of Rs. 89,000.

I shall deal briefly with these several contentions. The first contention set out above is based on the general principle of law that a person cannot both approbate and reprobate the same transaction and the leading Indian case on this point relied on for the defendants is *Shah Mukhun Lal* v. *Baboo Sree Kishan Singh* (5). That was a case in which their Lordships of the Privy Council held that three separate docu-ments constituted but one transaction and having so held re-fused to allow the plaintiff whose case it was to contend for other purposes of his own that only one of these three docu-ments should be looked at. What their Lordships did was gathering the real intention of the parties from all the docu-ments to give effect to it as far as the Usury Laws of Bengal would allow. Their Lordships themselves reiterated in their judgment that the rules of evidence and the law of estoppel forbid any addition to or variation from the deeds or written

5. (1868) 12 Moo I A 157.

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contracts and merely proceeded on the well-known principle of law that a party cannot both affirm and disaffirm the same transaction. Such a principle cannot be invoked in respect of a different recital in deeds and no such principle can be laid down as that a person who states that any portion of a document is true and binding between the parties should not be allowed to state that any other recital in the document is false.

If the principle that a party cannot approbate and reprobate at the same time is applicable to the case of recitals in documents it can only be by limiting its operation to the same recital and postulating that a party should not be allowed to approbate and reprobate the same recital, that is to say, state that it is untrue and at the same time seek to rely upon it. If the principle should be applied to different recitals in the same document, then, the numerous cases in which it has been repeatedly held that a party might be allowed to prove the falsity of the recitals of facts in documents would all have to be regarded as wrongly decided, but their Lordships of the Judicial Committee in the case of *Sah Lal Chand* v. *Indarjit* (6) have laid down as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid. The admissibility of such proof was not calculated to infringe any provision of S. 92 of the Evidence Act. In another case reported in the same volume, *Balkishen Das* v. *Legge* (7), their Lordships of the Judicial Committee lay down at pages 158 and 159 that questions regarding the admissibility of evidence should be decided only by reference to the Evidence Act and that the decisions of the English Court of Chancery have no application to the law of India as laid down in the Acts of the Legislature. Their Lordships, therefore, decided that oral evidence was inadmissible for the purpose of constructing the deeds or ascertaining the intention of parties. Strong reliance was placed by the learned vakil for the defendants on the reversal by their Lordships of the Judicial Committee of the Privy Council in their decision reported in *Hanif-un-nissa* v. *Faiz-un-nissa* (8) of the judgment of the Allahabad High

6. (1900) I L R 22 A 370 (P C).
7. (1899) I L R 22 A 149 (P C). 8. (1911) I L R 33 A 340.

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Court in *Faiz-un-nissa* v. *Hanif-un-nissa* (9). Lord Macnaghten in delivering the judgment of their Lordships summarily sets aside the judgment of the High Court as unsustainable. There is no discussion in that case of the principles of the decision, but it was contended that as the learned Lord directed that High Court should deal with the case on the evidence, it was an authority for the position that the judgment of the Allahabad High Court was wrong, which was to the effect that evidence was inadmissible to prove that what on the face was a sale deed was really intended to be and was a deed of gift. In the absence of any detailed statement of the grounds of the decision by their Lordships of the Judicial Committee I cannot assume that their Lordships intended to throw any doubt whatever on the decision of the Board in the case of *Sah Lal Chand* v. *Indarjit* (6). On the face of the judgment of the Allahabad High Court set aside so summarily by the Judicial Committee there is no doubt some room for such a contention as has been made by the learned vakil for the defendants. But on a close examination of the facts of the case of *Faiz-un-nissa* v. *Hanif-un-nissa* (9) it must be fairly clear that in the document which was the subject of construction, though there was a recital of an alleged fact that Rs. 60,000 had been paid by the transferee to the transferor, the document did not contain or purport to set out as such the terms of any contract grant of other disposition of property. If a deed does not set out the terms of the contract as such and merely contains the recital of the payment of some amount as consideration, the recital of payment is the mere recital of a fact which can be disproved, and it cannot be contended that though the terms of the contract are not as such set out the terms should be implied or inferred from the recital and parol evidence disallowed for the purpose of contradicting or varying such inferred or implied term of the contract or grant. I am therefore unable to regard the decision in *Hanif-un-nissa* v. *Faiz-un-nissa* (8) as an authority for holding that even though a deed might actually contain and set out the terms of a contract, oral evidence may be allowed to be adduced by one party to contradict or vary such terms, if the other party should allege or seek to prove the falsity of any recital of fact in the deed.

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6. (1900) I L R 22 A 370 (P C).

8. (1911) I.L R 33 A 340.

9. (1905) I L R 27 A 612.

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The case that at first sight seemed to support considerably the contention of the defendant was the decision in *Chunni Bibi* v. *Basanti Bibi* (10). That was a case in which the question that arose was whether when the plaintiffs alleged that they had not received the balance of consideration for a sale which was recited in the sale deed to have been paid to and received by them it was open to the defendants-purchasers to set up and prove that the real price agreed upon was different from and less than the amount for which the sale deed was made. In the course of his decision, Mr. Justice Chamier tried to distinguish from the facts of the case before him the case of *Adityam Aiyar* v. *Ramakrishna Aiyar* (1). I am, however, constrained respectfully to state that I am unable to appreciate or approve of the ground of distinction. I venture to think that there has been a great deal of confusion introduced in the consideration and discussion of the various cases referred to. At page 548 Mr. Justice Chamier sums up as follows : "On the authorities I would hold that as the respondents have alleged and proved that the whole of the consideration, receipt of which is acknowledged in the deed did not pass, the appellant is entitled to produce oral evidence in support of her allegations and as the Court below did not allow her to produce such evidence, I would remand the case for a fresh trial." The other learned Judge, Justice Banerji, merely refers to the case of *Hanif-un-nissa* v. *Faiz-un-nissa* (8) and held that as in that case their Lordships of the Privy Council decided that oral evidence can be given by the defendants to prove the real nature of the transaction, their Lordships were apparently of the opinion that the case would come within the first proviso to S. 92 and on that reasoning he agreed with the order proposed by Mr. Justice Chamier. From the statement of the case by either learned Judge in that case, I am unable to ascertain whether, apart from the clause in the recitals referring to the receipt of the whole consideration by the vendor, there was in the document any statement of the terms of the contract as such. From the words used by Mr. Justice Chamier I am rather inclined to think there was not. If there was not any such enumeration, then I must take it that what the deed contained was the recital of the fact of the receipt of Rs. 40,000. Such a clause should be deemed

1. (1913) I L R 38 M 514 : 25 M L J 602.
8. (1911) I L R 33 A 340. 10. (1914) I L R 36 A 537.

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merely to be a recital of fact regarding the payment of consideration and cannot be regarded as a clause setting out the terms of the contract or the terms on which the sale was agreed to be made. As I have already observed, from such a clause of the recital of the receipt of certain consideration, the terms of the agreement could only be inferred and therefore the clause itself could not be regarded as containing in writing the terms of the agreement. The expression "terms of the disposition of property" may be considered to be either the terms of the agreement relating to the disposition of property or the terms on which the property is alleged in the deed to be disposed of. If the latter construction should be adopted numerous decisions of all the High Courts including several of the Judicial Committee of the Privy Council would have to be regarded as opposed to the clear terms of the section. The expression should therefore be construed merely as meaning the terms of the contract made with regard to the disposition of the property. So construed and bearing in mind the weight of judicial opinion with regard to the matter, it must be held that if a document merely refers to the amount of consideration in the clause reciting the fact of the receipt of it, the document is not one in which the terms are reduced to writing, within the meaning of S. 92 of the Evidence Act. If this view is correct and if, as I think, there was no such separate enumeration of the terms in the document in the case of *Chunni Bibi* v. *Basanti Bibi* (10) the judgment in that case need not further be regarded. But if, on the other hand, there was in the document in that case a setting out the terms apart from the recital of the receipt of consideration, it seems to me to be impossible to consider that case as rightly decided. No rule of equity, it seems to me, can be allowed to over-ride the provisions of statutory law more especially of such a rule as is laid down in S. 92 of the Evidence Act with all its provisos. If therefore the decision in the case of *Chunni Bibi* v. *Basanti Bibi* (10) was to the effect that even though a document might contain all the terms of the contract, still because one party seeks to show by oral evidence that a certain recital of fact regarding the receipt of consideration is false which is not opposed to any provision in that section and which he is entitled to do as that section has been construed, the other party would then become entitled to disregard al-

10. (1914) I L R 36 A 537.

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together the provisions of S. 92 of the Evidence Act is a proposition which I feel I cannot possibly accede to. I have therefore come to the conclusion that the first contention of the learned vakil for the defendants is not tenable.

The second contention of the learned vakil for the defendants that the recited payment of the consideration of Rs. 89,000 should itself be regarded as the consideration for the assignment may no doubt be arguable if all that the deed contained was merely such a recital and there were not in the document set out the terms of the contract relating to the assignment. When the terms are distinctly set out, it is impossible to regard a mere recital of payment as anything other than a mere recital of fact which may be disproved.

The other two contentions of the learned vakil for the defendants may be conveniently dealt with together. They are merely different aspects of one and the same thing, namely, that whatever the agreement might have been regarding the terms on which the assignment was originally agreed to be made, still when it came to the actual execution of the deed of assignment, the parties chose for reasons of their own to put through the assignment on the footing of the assignor having actually been paid and received a total sum of Rs. 89,000 and of the balance alone being payable in the manner indicated in the deed. No doubt under the Indian Law the creditor is entitled to give up a portion of his claim, and there need be no consideration for any agreement by him so to give up. But before such an argument could be advanced, there must be a plea to the effect that that was what was done. If the defence was that though originally the price was agreed to be Rs. 2,89,000, still, subsequently the parties came together and the assignor agreed to accept Rs. 60,000 in lieu of Rs. 89,000, the plea may be valid. But that is not the plea. It may no doubt be contended that it is a mere matter of form. But, in my view, it is not a mere matter of form and it is really a matter of substance, something relating directly to the exact manner in which it was done. There are also obviously many difficulties in the way of considering the payment recited in the deed of assignment of the sum of Rs. 89,000 as past consideration in relation to a contract. Past consideration is something that had been done at the request of the promisor prior to entering into the contract. This is not such a case. I cannot, therefore, possibly accede

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to the contention that the recital of the payment of consideration of Rs. 89,000 should be regarded as recital of past consideration and that on such footing no enquiry should be permitted of the quantum of consideration.

The learned vakil for the defendants cited several cases to show that evidence has always been held to be admissible to show that the consideration recited in a deed was not the real consideration but that the real consideration was different. *Kailash Chandra Neogi* v. *Harish Chandra Biswas* (11); *Nathu Khan* v. *Sewak Koeri* (12); *Mahomed Yusuff* v. *Mahomed Musa* (13); *Lala Himmat Sahai Singh* v. *Llewhellen* (14); and *Vasudeva Bhatlu* v. *Narasamma* (15).

In none of the above cases does it appear that apart from the reference to the consideration in that part of the document containing the recital of the receipt of it there was anything in the document which can be regarded as setting out in writing the terms of the contract. In fact, in the last of the above cited cases which was strongly relied upon, the learned Judges state as follows :—" The provisions of the Evidence Act, S. 92, to which the District Judge refers, do not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged."

A sort of a supplementary contention was also put forward by the learned vakil for the defendants. It was this : The deed of assignment provided that in default of payment by the assignee of any portion of the purchase money or consideration he was not only not entitled to get a proportionate share of the rents and profits but he was further not to be entitled to a proportionate share in the properties that may be purchased by the decree-holder-assignor or the sale proceeds that may be realised by him on execution of the decree, and it was argued that if a particular remedy was provided between the contracting parties in the event of breach of contract or covenant by one of the parties, the other party should be confined only to that particular remedy and is not entitled to any other remedy and that he cannot even enforce the covenant expressed or implied in the manner of specific performance but must be relegated merely to the penalty or damages provided

11. (1900) 5 C W N 158.
12. (1911) 15 C W N 408.
13. (1907) 4 A L J 441.
14. (1885) I L R 11 C 486.
15. (1882) I L R 5 M 6.

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in the document. For this contention the learned vakil for the defendants referred to the case of *The Queen* v. *The Eastern Archipelago Company* (16). In that case the learned Judges were equally divided, with the result that the rule was refused. I cannot, therefore, regard the judgment in that case as laying down any principle which is available for application to the present case.

After all, the question whether a person is entitled to have a covenant enforced or to any remedies other than the remedy indicated in the contract, is a question of the intention of the parties to be deduced—whether on a proper construction of the entire document the remedy provided is cumulative or exclusive. Having regard to the terms of the document before me, I cannot possibly construe the remedy given to the assignor in the event of the assignee not paying the whole of the purchase money or consideration for the assignment as an exclusive remedy. In my view, the remedy is only cumulative and cannot deprive the plaintiff of the right to enforce the contract itself. The result of my holding otherwise would really be to reduce the so-called contract to a nullity, because, if there was no obligation on the part of the purchaser to pay the purchase money, and if on a construction of the contract he should be regarded only as entitled to a proportionate share of the rents and profits or of the properties or of the sale proceeds proportionate to the amount of the purchase money paid by him, then there is really no contract binding between the parties and what the parties should be deemed to have done was only to settle the terms of a proposal which might be turned into a contract only as and when the assignee pays the purchase money or portions thereof to the assignor. I refuse to regard the document under reference in any such light. I have no doubt whatever that what the parties really intended was that the consideration stipulated should be paid by the assignee to the assignor and they were only providing a sort of cumulative remedy for the event of the assignee not paying at any time the whole of the purchase money.

The conclusion, therefore, that I have arrived at is that the document, Ex. A, contains the terms of the contract between the parties, that it was a term of the contract of assignment, that the sum of Rs.89,000 should be paid by the assignee to the assignor on or before the execution of the deed, that

16. 1 El. & Bl 311.

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It is admitted by the defendants that only Rs. 60,000 was paid and that the balance of Rs. 29,000 was not paid, that there is no plea by the defendants that this balance of Rs. 29,000 was ever validly given up or that any other subsequent arrangement was validly entered into with regard to that amount, that the defendants are not entitled to show by oral evidence that the price agreed to was only Rs. 2,60,000 and not Rs. 2,89,000 in the face of the writing in Ex. A to the effect that the price agreed to be paid and payable by the deceased 1st defendant was Rs. 2,89,000. This disposes of the amount in question in the suit and it follows that the defendants are liable to pay to the plaintiffs the sum of Rs. 29,000, the admitted unpaid balance.

The next point for determination between the parties is with regard to the claim of the plaintiff for interest on the said sum of Rs. 29,000, the amount of unpaid purchase money. Having regard to the view taken by me on this question, I consider it unnecessary to deal in detail with the various grounds on which the learned vakil for the plaintiff put his case whether the claim is under the Interest Act or under the Transfer of Property Act or under the general law as and by way of damages. The principle underlying such claims is that whereas one party has under the arrangement derived all the advantages or secured all the rights stipulated for in the transaction, the other party has not received the full consideration stipulated for, and in respect of the amount wrongfully withheld some compensation should be made by award of interest or damages which might bear some relation either to the possible profits that might have been made with the money wrongfully detained by the person so detaining or to the possible profits that might have been earned by the person from whom the money is withheld if he had had the money which has been withheld from him. But I have already referred to the clause in the document by which in the event of the assignee not paying to the assignor the whole amount of the price, then, the profits payable or receivable by the assignee until he pays up the whole amount should be only that fraction of the one-eighth share which the amount already paid up by him is of the total price or consideration of Rs. 2,89,000. In other words, though the assignee may be compellable to pay the purchase money at any time after each particular portion thereof should become payable, still a

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penalty is provided for default in payment and the penalty is that he is not liable to receive from the assignor profits out of the one-eighth share, the Interest Act, it is in the discretion of the Court to allow interest or not. It cannot also be said in this case that the debt is payable by virtue of some written instrument at a certain time, because in the written instrument itself there is no covenant to pay, and unless there is a covenant to pay, the amount cannot be said to be payable by virtue of a written instrument.

As regards the argument that interest is payable under cl. 4, sub-cl. (*b*) of S. 55 of the Transfer of Property Act, assuming that the assignment of a mortgage decree is a sale of immoveable property, there can be no doubt that the particular sub-clause contemplates interest being payable only if the ownership of the property has entirely passed to the buyer and the property is in the hands and therefore in the enjoyment of the buyer. In the present case, not only is the profit claimable by the assignee proportionate to the amount of purchase money he has paid but the property or the sale proceeds to which he is entitled after execution is also stipulated and provided to be only proportionate to the amount of the purchase money paid by him. I cannot therefore regard the present case as one in which the ownership of the property has absolutely passed to the purchaser in respect of the whole interest the subject-matter of the bargain ; nor can I regard it as a case in which the property is in the hands of the buyer so as to enable him to enjoy the rents and profits thereof. The principle underlying the said clause undoubtedly is that if the buyer gets the title and enjoyment of the property purchased by him and does not pay any portion of the purchase money to the seller, he is bound to compensate him at least by payment of interest. In this case if the assignor suffered no damages and therefore does not need to be compensated, no question can arise regarding the payment of interest on the amount due. The same principles are also applicable to the claim regarded as one for damages for wrongfully withholding the purchase money. Further, no evidence has been adduced to show that so far as the plaintiff is concerned the share of rents and profits proportionate to the unpaid purchase money which the plaintiff will not have to pay to the defendants would not be adequate either as interest or as damages. With regard to the claim for interest, I have therefore come to the

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conclusion that the plaintiff is not entitled to any interest on the amount of the claim.

One last question also argued but not very strenuously by the learned vakil for the defendants should also be referred to. That related to the fourth issue as to whether the plaintiff's claim is barred by the Law of Limitation. The contention was that the plaint in the suit, when it was instituted was signed not by the plaintiff but by a person who purported to act as the agent of the plaintiff but who had not at the time of the institution of the suit obtained leave to sign and verify the plaint on behalf of the plaintiff. The plaint was presented to the Deputy Registrar on the 1st of October, 1920, it is said, on the last day of limitation. On that day, the plaintiff's agent had not obtained the necessary leave from the Deputy Registrar to sign and verify the plaint as the plaintiff's agent. That leave was granted subsequently by a learned Judge of this Court. The contention of the defendants is that for there being a proper plaint presented to the Court, leave to the agent to sign and verify the plaint is a condition precedent and until and unless such leave was contained, there was no proper plaint before the Court. I cannot possibly accede to the contention. On the last day of limitation there was a plaint before the Court in which the plaintiff now before the Court was stated to be the plaintiff and his agent purported to sign and verify the plaint on his behalf. The failure or omission to obtain leave was a mere irregularity and to hold that by reason of any such defect there was no proper plaint presented to the Court on that day would lead in most cases to disastrous consequences. Apart from that, I am not at all sure that with the plaint signed and verified as it was by the person who purported to act as the agent of the plaintiff and the order of the learned Judge of this Court granting leave, such leave when granted did not relate back to the institution of the suit and cure any irregularity attaching to the signing or verification of the plaint. In these circumstances I must hold that there is really no substance in the pleas of limitation embodied in the fourth issue.

In the view I have taken of the second issue it has become unnecessary to consider the first issue.

In the result, on my findings, there will be a decree in favour of the plaintiff for a sum of Rs. 29,000 without any

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interest. The defendants would be liable to pay interest from the date of the decree till payment at 6 per cent. per annum. There will be no personal liability as against the defendants, but the defendants would be liable to pay the amount decreed from and out of the assets of the deceased 1st defendant and the properties of the joint family in their hands. The defendants would also pay to the plaintiff the costs of the suit, the vakil's fees being calculated on the sum of Rs. 29,000 awarded to the plaintiff.

Mr. Chandrasekhara Aiyar, on behalf of the defendants, submits to that costs should be granted to his clients on the amount of interest claimed in the plaint and disallowed by me. I did not realise that it was such a large amount as about Rs. 10,000. I do not see any reason why costs should not follow the event with regard to the interest. The plaintiff will pay the defendants as and for costs of the interest disallowed the sum of Rs. 350.

The execution of the decree will be stayed for fifteen days, and if, by that time, the defendant pay into Court the amount decreed, then the plaintiff will draw the amount on furnishing security to the satisfaction of the Deputy Registrar of the Court, binding himself to repay the amount in the event of the case going against him in appeal.

A. V. V. *Suit decreed.*

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